

63C Am. Jur. 2d Public Officers and Employees Summary

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Public Officers and Employees

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☐ Public Officers and Employees

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**Summary**

**Scope:**

This article discusses public officers and employees, including discussions of the general nature and definitions of public office, employment, officers and employees, the basis of and rights to public office or employment, the manner of creating, modifying and abolishing public offices, eligibility and qualifications for public office or employment, the manner of acquiring or filling public offices and positions, vacancies in office, and prerequisites to entering public office or employment. Other matters discussed include the terms and tenure of office or employment, termination, suspension, or other adverse employment actions affecting public officers and employees, compensation, liability, actions, remedies, and matters of practice and procedure regarding proceedings involving public officers and employees.

Numerous federal statutes affect public officers and employees, including provisions pertaining to actions against Congressional officers for official acts; civil penalties for criminal offenses by public officers and employees; commissions and oaths; nepotism; circumstances under which the holding of federal positions is prohibited; suspension and removal of federal agency employees for national security reasons; financial disclosure requirements; the Office of Government Ethics; and restrictions on former officers, employees, and elected officials of the executive and legislative branches of government.

**Treated Elsewhere:**

Abnormally dangerous activities carried on in pursuance of public duty, liability of public officer or employee for, see [Am. Jur. 2d, Negligence § 404](#)

Action against public officer or employee as one against United States, see [Am. Jur. 2d, United States § 62](#)

Administrative law, see [Am. Jur. 2d, Administrative Law §§ 1 et seq.](#)

Assignment of salaries and fees of public officers and employees, see [Am. Jur. 2d, Assignments § 69](#)

Attorneys, public duties of, see [Am. Jur. 2d, Attorneys at Law § 5](#)

Bribery of public officials, see [Am. Jur. 2d, Bribery §§ 1 et seq.](#)

Civil service, generally, see [Am. Jur. 2d, Civil Service §§ 1 et seq.](#)

College or university officers as public officers or employees, status of state, see [Am. Jur. 2d, Colleges and Universities § 16](#)

Constitutional requirements of due process as affecting state officials, see [Am. Jur. 2d, Constitutional Law § 924](#)

Constitutional validity of legislation, sufficiency of interest of public officers to raise question regarding, see [Am. Jur. 2d, Constitutional Law §§ 153, 154](#)

Defamation of public officials, former officials, candidates for public office, and government employees, generally, see [Am. Jur. 2d, Libel and Slander §§ 42](#) to [53](#), [89](#), [90](#)

Depositions, propriety of taking with regard to public officials or former public officials, see [Am. Jur. 2d, Depositions and Discovery § 88](#)

Discrimination in employment, generally, see [Am. Jur. 2d, Job Discrimination §§ 1 et seq.](#)

Domicil of government employees, see [Am. Jur. 2d, Domicil § 31](#)

Elections, generally, see [Am. Jur. 2d, Elections §§ 1 et seq.](#)

Embezzlement by public officers, see [Am. Jur. 2d, Embezzlement §§ 33 to 35](#)

Employment relations, generally, see [Am. Jur. 2d, Employment Relationship §§ 1 et seq.](#)

Escheat, public officer upon whom duty rests to bring action for escheat or sale or conveyance of escheated property, see [Am. Jur. 2d, Escheat § 36](#)

Estoppel against federal government, state, county, municipality, township, or government agency, see [Am. Jur. 2d, Estoppel and Waiver §§ 146, 151 to 159](#)

Extortion by federal officers, see [Am. Jur. 2d, Extortion, Blackmail, and Threats § 8](#)

False statements or claims by, against, or to influence government officials, see [Am. Jur. 2d, False Pretenses §§ 77 et seq.](#)

Federal Employers' Liability Act, and Federal Employees' Compensation Act, see [Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 1 to 28, 77 to 98](#)

Federal Tort Claims Act, exclusion of claims based on acts or omissions of federal employees exercising due care, in execution of statute or regulation, or based on exercise or performance or failure to exercise or perform discretionary function or duty, see [Am. Jur. 2d, Federal Tort Claims Act §§ 34 et seq.](#)

Fence viewers or similar officers, see [Am. Jur. 2d, Fences §§ 19 to 24](#)

Governor, generally, see [Am. Jur. 2d, Governor §§ 1 et seq.](#); power to appoint or remove public officers, see [Am. Jur. 2d, Governor §§ 5 to 8](#)

Immunity of public officials from personal liability under federal civil rights statutes, see [Am. Jur. 2d, Civil Rights §§ 102, 105 to 109](#)

Impersonation of government officer or employee, see [Am. Jur. 2d, False Personation §§ 7 to 10](#)

Inspectors as public officers, generally, see [Am. Jur. 2d, Inspection Laws § 10](#)

Interference, liability of public officers for, see [Am. Jur. 2d, Interference § 55](#)

Irrigation districts, officers of, see [Am. Jur. 2d, Irrigation § 55](#)

Judgment by default, persons in military service and other federal officers as subject to, see [Am. Jur. 2d, Judgments §§ 247 to 249](#)

Jury service, status as public official or employee as affecting qualification for, see [Am. Jur. 2d, Jury § 265](#)

Labor relations, generally, see [Am. Jur. 2d, Labor and Labor Relations §§ 1 et seq.](#)

Larceny by public officer in possession or custody of property, see [Am. Jur. 2d, Larceny § 97](#)

Mandamus as applicable to compel performance of duties and acts of public officers or to enforce rights pertaining to public office, see [Am. Jur. 2d, Mandamus §§ 129 to 300](#)

Medicare coverage of federal employees, see [Am. Jur. 2d, Social Security and Medicare § 2056](#)

Municipal officers, agents, and employees, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 205 et seq.](#)

Notaries public, generally, see [Am. Jur. 2d, Notaries Public §§ 1 et seq.](#)

Obstructing or resisting law enforcement officers in performance of duties, see [Am. Jur. 2d, Obstructing Justice §§ 54 et seq.](#)

Offer of reward by public officer, see [Am. Jur. 2d, Rewards § 13](#)

Pardon as affecting forfeited office or eligibility to hold office, see [Am. Jur. 2d, Pardon and Parole § 61](#)

Particular public officers or employees, such as: the President and Vice President, see [Am. Jur. 2d, United States §§ 17 to 23](#); governors, see [Am. Jur. 2d, Governor §§ 1 et seq.](#); members of Congress, see [Am. Jur. 2d, United States §§ 3 to 16](#); judges, see [Am. Jur. 2d, Judges §§ 1 et seq.](#); justices of the peace, see [Am. Jur. 2d, Justices of the Peace §§ 1 et seq.](#); court clerks, see [Am. Jur. 2d, Clerks of Court §§ 1 et seq.](#); ambassadors, diplomats, and consular officials, see [Am. Jur. 2d, Ambassadors, Diplomats, and Consular Officials §§ 1 et seq.](#); coroners, see [Am. Jur. 2d, Coroners or Medical Examiners §§ 1 et seq.](#); customs officials, see [Am. Jur. 2d, Customs Duties and Import Regulations §§ 127 to 131](#); Bureau of Census officers and employees, see [Am. Jur. 2d, Census § 8](#); health officers, see [Am. Jur. 2d, Health §§ 9, 25 to 30](#); military officers, see [Am. Jur. 2d, Military and Civil Defense §§ 36 et seq.](#); prosecuting attorneys, see [Am. Jur. 2d, Prosecuting Attorneys §§ 1 et seq.](#); referees, see [Am. Jur. 2d, References §§ 23 to 28](#); law enforcement personnel, generally, see [Am. Jur. 2d, Sheriffs, Police, and Constables §§ 1 et seq.](#)

Pensions and retirement systems, see [Am. Jur. 2d, Pensions and Retirement Funds §§ 1 et seq.](#)  
Private corporations, officers of, see [Am. Jur. 2d, Corporations §§ 1166 et seq.](#)  
Public access to and disclosure of statements and information produced by public officers and employees, see [Am. Jur. 2d, Freedom of Information Acts §§ 1 et seq.](#)  
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Unemployment compensation benefits, federal employees and armed forces veterans as eligible for, see [Am. Jur. 2d, Unemployment Compensation §§ 56 to 58](#)  
Veterans, preferential right to public office or employment, see [Am. Jur. 2d, Veterans and Veterans' Laws §§ 89 to 96](#)

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## § 1. Definition and purpose

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 1

A "public office" is a position in a governmental system created, or at least recognized, by applicable law, to which certain permanent duties are assigned, either by the law itself or by regulations adopted under the law by an agency created under such law and acting in pursuance of it.[\[FN1\]](#) A public office has also been defined to be the right, authority, and duty created and conferred by law,[\[FN2\]](#) the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.[\[FN3\]](#)

A position is held to be a public office when it has been created by law and casts upon the incumbent duties which are continuing in their nature and not occasional, and which call for the exercise of some portion of the sovereignty of the state.[\[FN4\]](#) Thus, an office is a public charge, where the duties are continuing and prescribed by law, and not by contract, and the officer holder is invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere with the legislative, judicial, or executive departments of the government.[\[FN5\]](#)

Public offices are created for the purpose of effecting the end for which government has been instituted, which is the common good, and not for the profit, honor, or private interest of any one person, family, or class of persons.[\[FN6\]](#)

**Observation:** In some constitutions and statutes, the term "civil office" is used, and is generally defined in a manner similar to "public office."[\[FN7\]](#)

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[\[FN1\]](#) [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985).

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[\[FN2\]](#) [Ashe v. Clayton County Community Service Bd.](#), 262 Ga. App. 738, 586 S.E.2d 683 (2003).

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[\[FN3\]](#) [State ex rel. Gray v. King](#), 395 So. 2d 6 (Ala. 1981); [People v. Rosales](#), 129 Cal. App. 4th 81, 27 Cal. Rptr. 3d 897 (2d Dist. 2005); [State ex rel. Eli Lilly & Co. v. Gaertner](#), 619 S.W.2d 761 (Mo. Ct. App. E.D. 1981); [State ex rel. Milburn v. Pethel](#), 153 Ohio St. 1, 41 Ohio Op. 103, 90 N.E.2d 686 (1950); [Blackburn v. Board of County Com'rs of Park County](#), 67 Wyo. 494, 226 P.2d 784 (1951).

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[\[FN4\]](#) [Clark v. O'Malley](#), 169 Md. App. 408, 901 A.2d 279 (2006), judgment aff'd, 404 Md. 13, 944 A.2d 1122 (2008).

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[\[FN5\]](#) [Stuckey v. State](#), 560 N.E.2d 88 (Ind. Ct. App. 1990).

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[\[FN6\]](#) [Dean v. Paolicelli](#), 194 Va. 219, 72 S.E.2d 506 (1952); [In re Bratt](#), 257 Wis. 447, 43 N.W.2d 817 (1950).

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[\[FN7\]](#) [Clark v. O'Malley](#), 169 Md. App. 408, 901 A.2d 279 (2006), judgment aff'd, 404 Md. 13, 944 A.2d 1122 (2008); [Burton v. State Appeal Bd.](#), 38 Wis. 2d 294, 156 N.W.2d 386 (1968).

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## § 2. Distinguished from public employment

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 1

There is a distinction between a public office and a public employment,[[FN1](#)] and although every public office may be an employment, every public employment is not an office.[[FN2](#)] Whether a person holds a public office rather than mere employment does not depend upon what the particular office in question may be called, but upon the power granted and willed, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation.[[FN3](#)]

An office, as opposed to an employment, is a position for which the duties are continuing and are created by law instead of contract.[[FN4](#)] The duties include the performance of some sovereign power[[FN5](#)] for the public's benefit.[[FN6](#)]

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[[FN1](#)] [Evert v. Ouren](#), 37 Colo. App. 402, 549 P.2d 791 (App 1976); [In re Opinion of the Justices](#), 303 Mass. 631, 22 N.E.2d 49, 123 A.L.R. 199 (1939); [State ex rel. McIntosh v. Hutchinson](#), 187 Wash. 61, 59 P.2d 1117, 105 A.L.R. 1234 (1936).

- As to public employment, generally, see [§ 8](#).

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[[FN2](#)] [Metcalf & Eddy v. Mitchell](#), 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926); [Tipton v. Sands](#), 103 Mont. 1, 60 P.2d 662, 106 A.L.R. 474 (1936).

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[[FN3](#)] [Seymour v. Western Dakota Vocational Technical Institute](#), 419 N.W.2d 206, 44 Ed. Law Rep. 1330 (S.D. 1988).

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[\[FN4\] Lake County v. State ex rel. Manich, 631 N.E.2d 529 \(Ind. Ct. App. 1994\).](#)

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[\[FN5\] Schmidt v. Breeden, 134 N.C. App. 248, 517 S.E.2d 171, 136 Ed. Law Rep. 1063 \(1999\).](#)

-

[\[FN6\] Pike County v. State ex rel. Hardin, 469 N.E.2d 1188 \(Ind. Ct. App. 1984\); Clark v. O'Malley, 169 Md. App. 408, 901 A.2d 279 \(2006\), judgment aff'd, 404 Md. 13, 944 A.2d 1122 \(2008\).](#)

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### § 3. Nature as public trust or agency

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 1

Every public office is created in the interest and for the benefit of the people, and belongs to them.[\[FN1\]](#)  
Thus, a public office is a public agency or trust created in the interest and for the benefit of the people.[\[FN2\]](#)  
Such trust extends to all matters within the range of the duties pertaining to the office.[\[FN3\]](#)

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[\[FN1\] State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 206 P.2d 166 \(1949\); Lanza v. Wagner, 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344 \(1962\).](#)

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[\[FN2\] Taylor v. Beckham, 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 \(1900\); State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321 \(1935\); Jordan v. State ex rel. Williams, 217 Tenn. 307, 397 S.W.2d](#)

[383 \(1965\).](#)

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[\[FN3\] Sanchez v. Board of County Com'rs of Valencia County, 81 N.M. 644, 471 P.2d 678 \(Ct. App. 1970\).](#)

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## § 4. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [1](#), [2](#)

The characteristics or elements of a public office include:

- its creation by law,[\[FN1\]](#) that is, by statute or constitution[\[FN2\]](#)
- the designation of the position as an office[\[FN3\]](#)
- the prescription of the qualifications and duties of the appointee[\[FN4\]](#)
- the exercise of some portion of the sovereign power[\[FN5\]](#)
- a permanent[\[FN6\]](#) or continuing position, not occasional or contractual[\[FN7\]](#)
- a fixed term of office[\[FN8\]](#)
- oath[\[FN9\]](#) and bond[\[FN10\]](#) prescription or requirements

- liability for misfeasance or nonfeasance, and an independence of the official beyond that of employees[[FN11](#)]

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[FN1] [Seymour v. Western Dakota Vocational Technical Institute](#), 419 N.W.2d 206, 44 Ed. Law Rep. 1330 (S.D. 1988); [State v. Nelson](#), 189 W. Va. 778, 434 S.E.2d 697 (1993).

- As to the creation of public offices, generally, see [§§ 42 et seq.](#)

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[FN2] [Larson v. State](#), 564 P.2d 365 (Alaska 1977); [Housing Authority of City of New Haven v. Dorsey](#), 164 Conn. 247, 320 A.2d 820 (1973); [Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.](#), 37 Ill. App. 3d 926, 347 N.E.2d 34 (4th Dist. 1976); [Waddell v. Brooke](#), 684 N.W.2d 185 (Iowa 2004); [Eads v. City of Boulder City](#), 94 Nev. 735, 587 P.2d 39 (1978); [State v. Haskins](#), 160 N.C. App. 349, 585 S.E.2d 766, 180 Ed. Law Rep. 944 (2003).

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[FN3] [Boggess v. Housing Authority of City of Charleston](#), 273 F. Supp. 2d 729 (S.D. W. Va. 2003).

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[FN4] [State v. Nelson](#), 189 W. Va. 778, 434 S.E.2d 697 (1993).

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[FN5] [§ 5.](#)

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[FN6] [Witters v. Hicks](#), 335 Ill. App. 3d 435, 269 Ill. Dec. 241, 780 N.E.2d 713 (5th Dist. 2002).

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[FN7] [Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.](#), 37 Ill. App. 3d 926, 347 N.E.2d 34 (4th Dist. 1976); [Vander Lynden v. Crews](#), 205 N.W.2d 686 (Iowa 1973); [Haller v. Carlson](#), 42 A.D.2d 829, 346 N.Y.S.2d 108 (4th Dep't 1973); [Advisory Opinion to Senate](#), 108 R.I. 551, 277 A.2d 750 (1971).

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[FN8] [§ 6.](#)

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[FN9] [Boggess v. Housing Authority of City of Charleston](#), 273 F. Supp. 2d 729 (S.D. W. Va. 2003); [Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.](#), 37 Ill. App. 3d 926, 347 N.E.2d 34 (4th Dist. 1976).

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[FN10] [Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.](#), 37 Ill. App. 3d 926, 347 N.E.2d 34 (4th Dist. 1976); [State v. Nelson](#), 189 W. Va. 778, 434 S.E.2d 697 (1993).

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[FN11] [Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.](#), 37 Ill. App. 3d 926, 347 N.E.2d 34 (4th Dist. 1976).

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**§ 5. Sovereign power and functions as element**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [1](#), [2](#)

The power to exercise some portion of the sovereign functions of government is one of the characteristics,[[FN1](#)] or essential characteristics,[[FN2](#)] of a public office.Indeed, the power to exercise some sovereign government function has been called the most important characteristic of a public office.[[FN3](#)] Some authority holds that the primary, necessary, and fundamental test of a public office is that it should involve the exercise of some portion of the sovereign power of the state.[[FN4](#)]

The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority.[[FN5](#)] The duties must be performed independently and without control of a superior officer, other than the law,[[FN6](#)] unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer or body.[[FN7](#)]

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[[FN1](#)] [Seymour v. Western Dakota Vocational Technical Institute](#), 419 N.W.2d 206, 44 Ed. Law Rep. 1330 (S.D. 1988).

- Among the criteria to be considered in determining whether a position is an office or mere employment is whether the one occupying the position has been constituted a representative of the sovereign. [Boggess v. Housing Authority of City of Charleston](#), 273 F. Supp. 2d 729 (S.D. W. Va. 2003).

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[[FN2](#)] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985).

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[[FN3](#)] [Clark v. O'Malley](#), 169 Md. App. 408, 901 A.2d 279 (2006), judgment aff'd, 404 Md. 13, 944 A.2d 1122 (2008).

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[[FN4](#)] [Smith v. Jansen](#), 85 Misc. 2d 81, 379 N.Y.S.2d 254 (Sup 1975).

- The principal consideration determining whether a position is an office is the type of power that is wielded.

[Burton v. State Appeal Bd., 38 Wis. 2d 294, 156 N.W.2d 386 \(1968\).](#)

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[FN5] [Trempe v. Patten, 132 Conn. 120, 42 A.2d 834 \(1945\); Waddell v. Brooke, 684 N.W.2d 185 \(Iowa 2004\); Blackburn v. Board of County Com'rs of Park County, 67 Wyo. 494, 226 P.2d 784 \(1951\).](#)

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[FN6] [Waddell v. Brooke, 684 N.W.2d 185 \(Iowa 2004\).](#)

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[FN7] [State ex rel. Mathews v. Murray, 70 Nev. 116, 258 P.2d 982 \(1953\); Walton v. Brownsville Nav. Dist. of Cameron County, 181 S.W.2d 967 \(Tex. Civ. App. San Antonio 1944\), writ refused, \(Oct. 11, 1944\); Blackburn v. Board of County Com'rs of Park County, 67 Wyo. 494, 226 P.2d 784 \(1951\).](#)

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## § 6. Tenure and duration as element

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 1

Public office embraces the idea of tenure and duration,[FN1] and a fixed term of office is one of the characteristics of a public office.[FN2] The duration of office, however, need not be for a fixed period to constitute a public office.[FN3] The requirement of tenure means that the office itself has some permanence and continuity, and thus a public office may exist even in the absence of a fixed term for a particular incumbent.[FN4]

[FN1] [Metcalf & Eddy v. Mitchell](#), 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926); [Larson v. State](#), 564 P.2d 365 (Alaska 1977); [Sitton v. Fulton](#), 566 S.W.2d 887 (Tenn. Ct. App. 1978).

- As to the term of office of public officers and employees, generally, see [§§ 135 et seq.](#)

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[FN2] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985); [Advisory Opinion to Senate](#), 108 R.I. 551, 277 A.2d 750 (1971); [State v. Nelson](#), 189 W. Va. 778, 434 S.E.2d 697 (1993).

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[FN3] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985).

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[FN4] [Holmgren v. North Dakota Workers Compensation Bureau](#), 455 N.W.2d 200 (N.D. 1990).

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## § 7. Compensation as element; effect of public funding

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [1](#)

Although among the criteria to be considered in determining whether a position is an office or mere employment is whether a salary has been prescribed or required,[FN1] compensation is not an indispensable element of a public office.[FN2] The manner in which the compensation of a public position is fixed is not an absolute test to determine whether such position is an office, but is merely a circumstance to be considered in connection with other matters in determining the question.[FN3] Individuals may occupy positions which are



publicly funded and authorized by statute, but this does not compel the conclusion that they are public officers.[FN4]

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[FN1] Bogges v. Housing Authority of City of Charleston, 273 F. Supp. 2d 729 (S.D. W. Va. 2003); State v. Nelson, 189 W. Va. 778, 434 S.E.2d 697 (1993).

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[FN2] Abbott v. McNutt, 218 Cal. 225, 22 P.2d 510, 89 A.L.R. 1109 (1933); Warner v. Com., 400 S.W.2d 209 (Ky. 1966).

- As to compensation of public officers and employees, generally, see §§ 265 et seq.

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[FN3] Larson v. State, 564 P.2d 365 (Alaska 1977).

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[FN4] Reese v. Danforth, 486 Pa. 479, 406 A.2d 735, 6 A.L.R.4th 758 (1979).

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## § 8. Generally

### West's Key Number Digest

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A public employment is a position in the public service which lacks the required elements of an office to make it such.[FN1] Where, therefore, the position is created not by force of law, but by contract of employment, it does not rise to the dignity of an office.[FN2]

[FN1] [Tipton v. Sands](#), 103 Mont. 1, 60 P.2d 662, 106 A.L.R. 474 (1936); [Seymour v. Western Dakota Vocational Technical Institute](#), 419 N.W.2d 206, 44 Ed. Law Rep. 1330 (S.D. 1988); [Burton v. State Appeal Bd.](#), 38 Wis. 2d 294, 156 N.W.2d 386 (1968).

- As to the elements of a public office, see [§§ 4 et seq.](#)

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[FN2] [Metcalf & Eddy v. Mitchell](#), 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926); [In re McMillin's Estate](#), 46 Cal. 2d 121, 292 P.2d 881, 56 A.L.R.2d 1175 (1956).

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## § 9. Public officer

### West's Key Number Digest

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### A.L.R. Library

[Constitutional or statutory provision referring to "employees" as including public officers](#), 5 A.L.R.2d 415

The term "officer" is one inseparably connected with an office.[FN1] Thus, one who holds a public office is a public officer,[FN2] and where there is no office, there can be no public officer.[FN3]

The question as to whether a person holding a public position is a public officer or merely a public employee is primarily one of statutory powers and duties.[FN4] Key considerations are the nature of the office, the powers wielded, and the responsibilities which are carried out.[FN5] Characteristics of a public officer include:

- the creation of the person's position by either a state constitution or statute,[FN6] as well as the prescription of his or her duties and powers by law,[FN7] rather than by contract[FN8]
- a requirement of law that such person be elected or appointed[FN9]
- the designation or title given the person is one conferred by law[FN10]
- a specified or fixed term of employment[FN11]
- a required oath of office[FN12]
- the delegation to[FN13] and exercise of some portion of governmental sovereign power,[FN14] with supervisory[FN15] and discretionary[FN16] authority

Importance, dignity, and independence of office also are relevant factors in the determination of public officer status.[FN17] An individual is a public officer if any sovereign function of the government is conferred upon that individual to be exercised largely independent of the control of others.[FN18] Similarly, if the office occupied involves a large degree of independence in which the individual is not under the direct supervision and control of an employer, then the individual is a public officer.[FN19] Subordination to a superior, however, does not necessarily render a subordinate a nonofficial.[FN20]

While public officials have sometimes been considered employees for specific purposes,[FN21] a public officer is generally distinguished from a public employee by his or her power of supervision and control and by his or her liability to be called to account as a public offender in case of malfeasance in office.[FN22]

**Observation:** Some statutes include officers among the definition of "employee." [FN23]

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[FN1] Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926).

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[FN2] Murach v. Planning and Zoning Com'n of City of New London, 196 Conn. 192, 491 A.2d 1058 (1985); Raduszewski v. Superior Court In and For New Castle County, 232 A.2d 95 (Del. 1967); State ex inf. McKittrick v. Whittle, 333 Mo. 705, 63 S.W.2d 100, 88 A.L.R. 1099 (1933); Vance S. Harrington & Co. v. Renner, 236 N.C. 321, 72 S.E.2d 838 (1952).

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[FN3] Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926); State ex rel. McIntosh v. Hutchinson, 187 Wash. 61, 59 P.2d 1117, 105 A.L.R. 1234 (1936).

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[FN4] Seymour v. Western Dakota Vocational Technical Institute, 419 N.W.2d 206, 44 Ed. Law Rep. 1330 (S.D. 1988).

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[FN5] Reese v. Danforth, 486 Pa. 479, 406 A.2d 735, 6 A.L.R.4th 758 (1979); Bedeski v. Greater Nanticoke Area School Dist., 58 Pa. Commw. 400, 427 A.2d 1269 (1981).

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[FN6] Satorre v. New Hanover County Bd. of Com'rs, 165 N.C. App. 173, 598 S.E.2d 142 (2004).

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[FN7] In re Request of Governor for Advisory Opinion, 722 A.2d 307 (Del. 1998); Stork v. Board of Trustees of Village of Medina, 179 A.D.2d 1058, 579 N.Y.S.2d 797 (4th Dep't 1992).

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[FN8] [Steece v. State, Dept. of Agriculture, 504 So. 2d 984 \(La. Ct. App. 1st Cir. 1987\).](#)

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[FN9] [Smith v. Board of Education of Ludlow, 23 F. Supp. 328 \(E.D. Ky. 1938\); Glover v. City of Columbus, 197 Miss. 467, 19 So. 2d 756, 156 A.L.R. 1350 \(1944\); State ex rel. Williamson v. Evans, 1957 OK 304, 319 P.2d 1112 \(Okla. 1957\).](#)

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[FN10] [State ex rel. Williamson v. Evans, 1957 OK 304, 319 P.2d 1112 \(Okla. 1957\).](#)

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[FN11] [Daniels v. City of Venice, 162 Ill. App. 3d 788, 114 Ill. Dec. 546, 516 N.E.2d 701 \(5th Dist. 1987\); Steece v. State, Dept. of Agriculture, 504 So. 2d 984 \(La. Ct. App. 1st Cir. 1987\).](#)

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[FN12] [In re Request of Governor for Advisory Opinion, 722 A.2d 307 \(Del. 1998\); Steece v. State, Dept. of Agriculture, 504 So. 2d 984 \(La. Ct. App. 1st Cir. 1987\); Messick v. Catawba County, N.C., 110 N.C. App. 707, 431 S.E.2d 489 \(1993\).](#)

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[FN13] [People v. Rosales, 129 Cal. App. 4th 81, 27 Cal. Rptr. 3d 897 \(2d Dist. 2005\).](#)

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[FN14] [In re Request of Governor for Advisory Opinion, 722 A.2d 307 \(Del. 1998\); Steece v. State, Dept. of Agriculture, 504 So. 2d 984 \(La. Ct. App. 1st Cir. 1987\); Satorre v. New Hanover County Bd. of Com'rs, 165 N.C. App. 173, 598 S.E.2d 142 \(2004\).](#)

- A public officer is invested by law to perform a function of government, while an employee is not. [T & K Roofing Co., Inc. v. Iowa Dept. of Educ., 593 N.W.2d 159, 134 Ed. Law Rep. 574 \(Iowa 1999\).](#)

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[FN15] [Daniels v. City of Venice, 162 Ill. App. 3d 788, 114 Ill. Dec. 546, 516 N.E.2d 701 \(5th Dist. 1987\).](#)

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[FN16] [Daniels v. City of Venice, 162 Ill. App. 3d 788, 114 Ill. Dec. 546, 516 N.E.2d 701 \(5th Dist. 1987\); Messick v. Catawba County, N.C., 110 N.C. App. 707, 431 S.E.2d 489 \(1993\).](#)

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[FN17] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\).](#)

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[FN18] [Prieto Bail Bonds v. State, 994 S.W.2d 316 \(Tex. App. El Paso 1999\),](#) petition for discretionary review refused, (Nov. 21, 2001).

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[FN19] [State v. Haltom, 462 So. 2d 662 \(La. Ct. App. 1st Cir. 1984\).](#)

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[FN20] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\).](#)

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[FN21] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\)](#) (stating that public officials are employees for purposes of North Dakota's workers' compensation law).

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[FN22] [Pike County v. State ex rel. Hardin, 469 N.E.2d 1188 \(Ind. Ct. App. 1984\).](#)

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[FN23] [Am. Jur. 2d, Civil Service § 5.](#)

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## § 10. Public employee

### West's Key Number Digest

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### A.L.R. Library

[Who are "Public Employers" or "Public Employees" Within the Meaning of State Whistleblower Protection Acts, 90 A.L.R.5th 687](#)

In contrast to public officers, who exercise some portion of sovereign power and are vested with discretionary authority,[FN1] an employee does not have such power or authority.[FN2] Public employees are generally responsible for performing ministerial duties.[FN3]

**Observation:** While discretionary duties involve personal deliberation, decision and judgment, ministerial duties are those which are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.[FN4]

One who merely performs the duties required of him or her by persons employing him or her under an express or implied contract, though such persons themselves may be public officers, and though the employment may be in or about public work or business, is a mere employee.[FN5]

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[FN1] § 9.

[\[FN2\] Daniels v. City of Venice, 162 Ill. App. 3d 788, 114 Ill. Dec. 546, 516 N.E.2d 701 \(5th Dist. 1987\).](#)

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[\[FN3\] Dalenko v. Wake County Dept. of Human Services, 157 N.C. App. 49, 578 S.E.2d 599 \(2003\), writ denied, 585 S.E.2d 380 \(N.C. 2003\).](#)

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[\[FN4\] Messick v. Catawba County, N.C., 110 N.C. App. 707, 431 S.E.2d 489 \(1993\).](#)

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[\[FN5\] Seymour v. Western Dakota Vocational Technical Institute, 419 N.W.2d 206, 44 Ed. Law Rep. 1330 \(S.D. 1988\).](#)

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## § 11. Basis of office or employment

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [77](#), [78](#)

While, as a general rule, the relationship of employer and employee is contractual in nature,[[FN1](#)] a public employee does not hold his or her office ex contractu, that is, pursuant to contract in the sense of an agreement or bargain between him or her and the public, but rather holds his or her office ex lege, as a matter of law, or pursuant to statute.[[FN2](#)] Thus, public employment is generally held[[FN3](#)] and governed[[FN4](#)] by statute, not contract. Similarly, employees of charter governments work subject to the amendment, revision or repeal of charter provisions affecting their employment.[[FN5](#)] States, however, may enter into written employment contracts with individuals on specific occasions.[[FN6](#)]

**Observation:** Federal employees serve by appointment, not by contract, and the terms of the appointment displace previous understandings, understandings that in other contexts might have created a contractual right.[[FN7](#)]

## CUMULATIVE SUPPLEMENT

### Cases:

Ordinarily, employment of public employees is governed by statute, not contract. [Cabaness v. Thomas, 2010 UT 23, 232 P.3d 486 \(Utah 2010\)](#).

[END OF SUPPLEMENT]

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[\[FN1\] Am. Jur. 2d, Employment Relationship § 9.](#)

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[\[FN2\] Cobb v. Village of Oakwood, 789 F. Supp. 237 \(N.D. Ohio 1991\), judgment aff'd, 959 F.2d 234 \(6th Cir. 1992\); Cook v. Maxwell, 57 Ohio App. 3d 131, 567 N.E.2d 292 \(1st Dist. Hamilton County 1989\).](#)

- The public employment relationship derives from applicable statutory schemes and not from an independent contract between a public employer and employee. [DiPaolo v. Passaic County Board of Chosen Freeholders, 322 N.J. Super. 487, 731 A.2d 519 \(App. Div. 1999\), aff'd, 162 N.J. 572, 745 A.2d 540 \(2000\).](#)

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[\[FN3\] Lachtman v. Regents of University of California, 158 Cal. App. 4th 187, 70 Cal. Rptr. 3d 147, 227 Ed. Law Rep. 863 \(4th Dist. 2007\).](#)

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[\[FN4\] Masters v. San Bernardino County Employees Retirement Assn., 32 Cal. App. 4th 30, 37 Cal. Rptr. 2d 860 \(4th Dist. 1995\); Canfield v. Layton City, 2005 UT 60, 122 P.3d 622 \(Utah 2005\); Weber v. State, Dept. of Corrections, 78 Wash. App. 607, 898 P.2d 345 \(Div. 3 1995\).](#)

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[\[FN5\] Hinchliffe v. City of San Diego, 165 Cal. App. 3d 722, 211 Cal. Rptr. 560 \(4th Dist. 1985\).](#)

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[\[FN6\] Weber v. State, Dept. of Corrections, 78 Wash. App. 607, 898 P.2d 345 \(Div. 3 1995\).](#)

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[\[FN7\] Riplinger v. U.S., 695 F.2d 1163 \(9th Cir. 1983\).](#)

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**§ 12. Right to hold office or employment or to be considered for such**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [79](#) to [81](#)



There is some difference of opinion as to whether the holding of a public office is a right. Some authorities hold that public officers generally possess no vested right to a public office,[FN1] and that an incumbent has no vested right in the office which he or she holds.[FN2] Such authorities state the opportunity to hold public office is a privilege, rather than a right,[FN3] and hold that there is no fundamental,[FN4] inherent,[FN5] or constitutionally protected right to public employment or to hold public office.[FN6] Furthermore, it has been said that there is no right to public office unless it is under express constitutional protection,[FN7] and that a public employee ordinarily has no vested contractual right in the terms of his or her employment, such terms being subject to change by the proper statutory authority.[FN8]

On the other hand, some authorities have stated that the right to hold public office is a valuable right of citizenship,[FN9] and a fundamental right,[FN10] although there is some authority within such jurisdictions indicating support for the contrary position.[FN11] Furthermore, some authorities hold there is a fundamental right to be considered for public employment without invidious discrimination or unreasonable limitation.[FN12]

While some authorities hold that there is no right to run for office,[FN13] nor any express constitutional provision guaranteeing any individual the right to become a candidate for public office,[FN14] and that no fundamental status has been attached to candidacy,[FN15] other authorities hold that the right to be a candidate for public office is a valuable right,[FN16] and that the right to become a candidate[FN17] and run for public office is a fundamental right.[FN18]

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[FN1] In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968); Lyons v. City of Pittsburgh, 137 Pa. Commw. 330, 586 A.2d 469 (1991).

- No person has a vested right to any public office or position except as provided by law, and if a competent authority abolishes the position for a legitimate reason, the holder thereof has no remedy because he or she has necessarily lost the position and the salary which goes with it. Proksa v. Arizona State Schools for the Deaf and the Blind, 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003).

[FN2] Dodge v. Board of Education of City of Chicago, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937); Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975); State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. 1972); Hockman v. Tucker County Court, 138 W. Va. 132, 75 S.E.2d 82 (1953).

[FN3] State v. Williams, 82 Ohio App. 3d 70, 611 N.E.2d 443, 82 Ed. Law Rep. 177 (8th Dist. Cuyahoga County 1992); Leach v. Fischer, 669 S.W.2d 844 (Tex. App. Fort Worth 1984).

[FN4] Artritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); National Ass'n of Government Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998); McCool v. City of Philadelphia, 494 F. Supp. 2d 307 (E.D. Pa. 2007); Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

[FN5] McGee v. Borom, 341 So. 2d 141 (Ala. 1976); Wright v. Mead School Dist. No. 354, 87 Wash. App. 624, 944 P.2d 1, 121 Ed. Law Rep. 312 (Div. 3 1997).

[FN6] Arceneaux v. Treen, 671 F.2d 128 (5th Cir. 1982); Talbot v. Pyke, 533 F.2d 331 (6th Cir. 1976); Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979); Dixon v. Osman, 22 Ariz. App. 430, 528 P.2d 181 (Div. 1 1974); Klein v. Civil Service Commission of Cedar Rapids, 260 Iowa 1147, 152 N.W.2d 195 (1967); Johnson v. State, Civil Service Dept., 280 Minn. 61, 157 N.W.2d 747 (1968); Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952).

- As to rights of civil service employees to their positions, generally, see Am. Jur. 2d, Civil Service § 41.

[FN7] Lyons v. City of Pittsburgh, 137 Pa. Commw. 330, 586 A.2d 469 (1991).

[\[FN8\] Hinchliffe v. City of San Diego, 165 Cal. App. 3d 722, 211 Cal. Rptr. 560 \(4th Dist. 1985\).](#)

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[\[FN9\] People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque, 105 Cal. App. 4th 259, 129 Cal. Rptr. 2d 298 \(1st Dist. 2003\).](#)

- The right to hold office is a valuable one. [State v. Musto, 187 N.J. Super. 264, 454 A.2d 449 \(Law Div. 1982\), opinion aff'd, 188 N.J. Super. 106, 456 A.2d 114 \(App. Div. 1983\).](#)

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[\[FN10\] Zeilenga v. Nelson, 4 Cal. 3d 716, 94 Cal. Rptr. 602, 484 P.2d 578 \(1971\); People v. Ballard, 104 Cal. App. 3d 757, 164 Cal. Rptr. 81 \(4th Dist. 1980\).](#)

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[\[FN11\] Johnson v. Hamilton, 15 Cal. 3d 461, 125 Cal. Rptr. 129, 541 P.2d 881 \(1975\)](#) (noting that federal Supreme Court decisions suggested that candidacy for public office may not be a fundamental right protected by the 14th Amendment and that legislative restrictions upon it need not necessarily invoke strict scrutiny).

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[\[FN12\] § 52.](#)

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[\[FN13\] Peterson v. Knutson, 367 F. Supp. 515 \(D. Minn. 1973\), aff'd without opinion, 505 F.2d 736 \(8th Cir. 1974\).](#)

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[\[FN14\] Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 \(1978\).](#)

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[\[FN15\] Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 \(1972\).](#)

- The right to run for public office, and with it the status of candidacy, is not itself viewed as a fundamental right. [Clough v. Guzzi, 416 F. Supp. 1057 \(D. Mass. 1976\).](#)

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[\[FN16\] McGee v. Borom, 341 So. 2d 141 \(Ala. 1976\); Levey v. Dijols, 990 So. 2d 688 \(Fla. Dist. Ct. App. 4th Dist. 2008\), review denied, 994 So. 2d 304 \(Fla. 2008\).](#)

- Every voter has a right to be a candidate for a public office if he or she possesses the qualifications required to fill the office. [State v. Hodges, 92 S.W.3d 489 \(Tex. 2002\).](#)

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[\[FN17\] Populist Party of Arkansas v. Chesterfield, 359 Ark. 58, 195 S.W.3d 354 \(2004\); Deeds v. Lindsey, 179 W. Va. 674, 371 S.E.2d 602 \(1988\).](#)

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[\[FN18\] State ex rel. Sandy v. Johnson, 212 W. Va. 343, 571 S.E.2d 333 \(2002\).](#)

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**§ 13. Right to hold office or employment or to be considered for such—Property rights**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 79 to 81

While there is some authority for the view that public officers, properly elected, have property rights in their respective offices,[[FN1](#)] and that one may have a property right in public employment if he or she has an enforceable expectation of continued employment or some form of guarantee,[[FN2](#)] there is other authority that holds that a public officer or public employee does not have a right of property in his or her office or employment,[[FN3](#)] and that an elected office is not a property interest with which an officeholder has a recognizable reasonable expectancy of continued employment as one might find in an employment setting.[[FN4](#)] There also is authority that a public office is not property within the provision of the United States Constitution prohibiting deprivation of property without due process of law,[[FN5](#)] or within an agreement in a treaty with the United States not to impair the property or rights of private individuals.[[FN6](#)]

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[[FN1](#)] [Butler v. Cocke County](#), 671 S.W.2d 847 (Tenn. Ct. App. 1984).

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[[FN2](#)] [Appeal of Colban](#), 58 Pa. Commw. 104, 427 A.2d 313 (1981) (guarantee of employment found in disciplinary procedure in employee handbook).

- As to property interests with regard to rights to continued employment, generally, see [§ 136](#).

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[[FN3](#)] [Dunn v. Bruzzese](#), 172 Ohio App. 3d 320, 2007-Ohio-3500, 874 N.E.2d 1221 (7th Dist. Jefferson County 2007).

- Public employment is not property, and there is no property right involved when the only thing at stake is a specific job for which the individual has only an abstract need or desire, rather than a legitimate claim of entitlement to that job based on contract, statute, or regulation. [Dixon v. Osman](#), 22 Ariz. App. 430, 528 P.2d 181 (Div. 1 1974).

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[[FN4](#)] [Maag v. Illinois Coalition for Jobs, Growth and Prosperity](#), 368 Ill. App. 3d 844, 306 Ill. Dec. 909, 858 N.E.2d 967 (5th Dist. 2006), appeal denied, 223 Ill. 2d 637, 310 Ill. Dec. 249, 865 N.E.2d 969 (2007).

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[[FN5](#)] [Snowden v. Hughes](#), 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944); [Carlyle v. Sitterson](#), 438 F. Supp. 956 (E.D. N.C. 1975).

- A public office is not property in the constitutional sense and the right to be appointed to a public office is not a property right within the protection of the due process clause. [Ramsbottom Co. v. Bass/Zebulon Roads Neighborhood Ass'n](#), 273 Ga. 798, 546 S.E.2d 778 (2001).

- Where state law withholds entitlement to employment by the state until certain conditions are met, the employee cannot acquire a property interest sufficient to invoke due process protection. [Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 \(1985\)](#).

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[\[FN6\] Alvarez v. U.S., 216 U.S. 167, 30 S. Ct. 361, 54 L. Ed. 432 \(1910\)](#).

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## **§ 14. Absence of contractual relationship arising from employment or office**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [77](#)

Public employment does not give rise to a contractual relationship in the conventional sense.[\[FN1\]](#) Neither does an appointment or election to a public office establish a contractual relation between the person appointed or elected and the public.[\[FN2\]](#) Indeed, the nature and scope of a public office fundamentally transcends a mere contractual relationship.[\[FN3\]](#)

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[\[FN1\] Zucker v. U.S., 578 F. Supp. 1239 \(S.D. N.Y. 1984\)](#), decision aff'd, [758 F.2d 637 \(Fed. Cir. 1985\)](#).

- Public employees in Ohio differ from private employees in that they cannot have any contractual relationship with their employer; the relationship between a governmental employer and employee is governed exclusively by statute or legislative enactment. [Cobb v. Village of Oakwood, 789 F. Supp. 237 \(N.D. Ohio 1991\)](#), judgment aff'd, [959 F.2d 234 \(6th Cir. 1992\)](#).

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[\[FN2\] Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 37 Ill. App. 3d 926, 347 N.E.2d 34 \(4th Dist. 1976\); Miller v. Board of Com'rs of Ottawa County, 146 Kan. 481, 71 P.2d 875 \(1937\).](#)

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[\[FN3\] State v. Mason, 355 N.J. Super. 296, 810 A.2d 88 \(App. Div. 2002\).](#)

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### Primary Authority

U.S. Const. Art. I, § 6

U.S. Const. Art. II, §§ 2, [4](#)

[5 U.S.C.A. §§ 2101 et seq., 2104, 2105](#)

[18 U.S.C.A. § 912](#)

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## § 15. Constitutional offices

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [1](#)

A constitutional office is one created by the United States Constitution or by a state constitution,[\[FN1\]](#) as distinguished from an office created by statute.[\[FN2\]](#) A reference in a state constitution to a particular position, however, does not automatically render that position a constitutional office.[\[FN3\]](#)

The legislature's power over constitutional offices is limited.[\[FN4\]](#) A legislature cannot abolish a constitutional office,[\[FN5\]](#) nor can it change such an office, except as expressly permitted by the constitution itself.[\[FN6\]](#) Thus, for example, the legislature has no power to change the title of a constitutional office.[\[FN7\]](#) The legislature may, however, grant additional powers to a constitutional office by statute.[\[FN8\]](#)

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[\[FN1\]](#) [State v. Goldthait, 172 Ind. 210, 87 N.E. 133 \(1909\).](#)

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[\[FN2\]](#) [Calvert County Com'rs v. Monnett, 164 Md. 101, 164 A. 155, 86 A.L.R. 1258 \(1933\); Attorney General v. Tufts, 239 Mass. 458, 131 N.E. 573, 17 A.L.R. 274 \(1921\).](#)

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[\[FN3\]](#) [State ex rel. Harvey v. Second Judicial Dist. Court, 117 Nev. 754, 32 P.3d 1263 \(2001\).](#)

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[\[FN4\] State ex rel. Grant v. Eaton, 114 Mont. 199, 133 P.2d 588 \(1943\).](#)

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[\[FN5\] § 45.](#)

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[\[FN6\] State ex rel. Grant v. Eaton, 114 Mont. 199, 133 P.2d 588 \(1943\).](#)

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[\[FN7\] State ex rel. Hamilton v. Troy, 190 Wash. 483, 68 P.2d 413, 110 A.L.R. 1211 \(1937\).](#)

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[\[FN8\] Massachusetts Bay Transp. Authority v. Auditor of Com., 430 Mass. 783, 724 N.E.2d 288 \(2000\).](#)

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## **§ 16. Federal offices and officers**

### **West's Key Number Digest**

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The test for what constitutes an office under the government of the United States is whether the incumbent is entitled by the office to exercise a portion of the sovereignty of the United States Government.[\[FN1\]](#)

For purposes of the statutes pertaining to federal employees, generally,[\[FN2\]](#) an "officer" means, with specified exceptions, a justice or judge of the United States,[\[FN3\]](#) and an individual who is: required by law to be appointed in the civil service by the President,[\[FN4\]](#) a court of the United States,[\[FN5\]](#) the head of an executive agency,[\[FN6\]](#) or the Secretary of a military department,[\[FN7\]](#) while such appointing authorities are acting in an official capacity;[\[FN8\]](#) engaged in the performance of a federal function under authority of law or an executive act;[\[FN9\]](#) and subject to the supervision of one of the appointing authorities, or the Judicial Conference of the United States, while engaged in the performance of the duties of his or her office.[\[FN10\]](#) An officer is included within the definition of "employee" under the applicable federal provisions.[\[FN11\]](#)

A number of provisions of the United States Constitution indicate that members of Congress are not officers.[FN12] Also, for the purpose of the federal statutes generally pertaining to government organization and employees, members of Congress are not officers,[FN13] although their staff members are employees of the United States.[FN14] On the other hand, a member of Congress has been held to be an officer of the United States within a statute,[FN15] making it a crime to impersonate such an officer.[FN16]

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[FN1] [In re Sundlun, 585 A.2d 1185 \(R.I. 1991\).](#)

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[FN2] [5 U.S.C.A. §§ 2101 et seq.](#)

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[FN3] [5 U.S.C.A. § 2104\(a\).](#)

- As to federal judges, generally, see [Am. Jur. 2d, Federal Courts §§ 18 et seq.](#)

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[FN4] [5 U.S.C.A. § 2104\(a\)\(1\)\(A\).](#)

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[FN5] [5 U.S.C.A. § 2104\(a\)\(1\)\(B\).](#)

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[FN6] [5 U.S.C.A. § 2104\(a\)\(1\)\(C\).](#)

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[FN7] [5 U.S.C.A. § 2104\(a\)\(1\)\(D\).](#)

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[FN8] [5 U.S.C.A. § 2104\(a\)\(1\).](#)

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[FN9] [5 U.S.C.A. § 2104\(a\)\(2\).](#)

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[FN10] [5 U.S.C.A. § 2104\(a\)\(3\).](#)

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[FN11] [5 U.S.C.A. § 2105\(a\).](#)

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[FN12] [Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 \(2d Cir. 1970\)](#) (referring to U.S. Const. Art. I, § 6, U.S. Const. Art. II, §§ 2, 4).

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[FN13] [Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 \(2d Cir. 1970\)](#) (referring to the provisions of [5 U.S.C.A. § 2104](#)).

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[FN14] [Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 \(2d Cir. 1970\)](#) (referring to the provisions of [5 U.S.C.A. § 2105](#)).

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[FN15] [18 U.S.C.A. § 912.](#)

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[FN16] [Lamar v. U.S., 241 U.S. 103, 36 S. Ct. 535, 60 L. Ed. 912 \(1916\); Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 \(2d Cir. 1970\).](#)

- As to false impersonation of a government officer or employee, generally, see [Am. Jur. 2d, False Personation §§ 7 to 10.](#)

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## § 17. State or local officers

### West's Key Number Digest

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State officers are those who receive authority under the laws of a state and perform some of the governmental functions of the state. They are, in a general sense, those whose duties are coextensive with the state or are not limited to any political subdivision of the state.[FN1] In contrast, an officer of a municipality, county, or other local subdivision is one whose duties and functions relate exclusively to the local affairs of the municipality, county, or other local subdivision, rather than the state at large.[FN2] Officers may be state officers even though some of their functions relate to local matters.[FN3] The source of funding of employees is not conclusive in determining one's status as a state or county employee.[FN4]

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[FN1] [Am. Jur. 2d, States, Territories, and Dependencies § 61.](#)

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[FN2] [Am. Jur. 2d, Municipal Corporations, Counties, and other Political Subdivisions § 205.](#)

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[FN3] [State v. Linn, 1915 OK 1037, 49 Okla. 526, 153 P. 826 \(1915\).](#)

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[FN4] [Warren v. Stone, 958 F.2d 1419 \(7th Cir. 1992\); Drury v. McLean County, 89 Ill. 2d 417, 60 Ill. Dec. 624, 433 N.E.2d 666 \(1982\).](#)

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## § 18. Executive officers

### West's Key Number Digest

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An executive officer is one in whom is vested the power and the duty to cause the laws to be executed.<sup>[FN1]</sup> Executive officers include the President of the United States,<sup>[FN2]</sup> and the governor<sup>[FN3]</sup> and lieutenant governor<sup>[FN4]</sup> of a state.

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[FN1] [State v. Loechner, 65 Neb. 814, 91 N.W. 874 \(1902\).](#)

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[FN2] [Am. Jur. 2d, United States § 20.](#)

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[FN3] [Am. Jur. 2d, Governor § 1.](#)

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[FN4] [Rouse v. Johnson, 234 Ky. 473, 28 S.W.2d 745, 70 A.L.R. 1077 \(1930\).](#)

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## § 19. Judicial officers

### West's Key Number Digest

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A judicial officer is one who exercises judicial functions by way of adjudicating controversies and interpreting laws.[FN1] Judicial officers, such as judges[FN2] and justices of the peace,[FN3] are public officers.

While in many instances in the performance of their duties officers may exercise a discretion or judgment quasi-judicial in character, this fact alone does not bring them within the category of judicial officers.[FN4] An officer having both ministerial and judicial duties is generally termed a quasi-judicial officer.[FN5] The following officers have been held to be quasi-judicial: a state bank examiner;[FN6] a member of a guaranty trust fund;[FN7] and an attorney at law.[FN8]

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[FN1] [Adams v. State, 214 Ind. 603, 17 N.E.2d 84, 118 A.L.R. 1095 \(1938\).](#)

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[FN2] [Am. Jur. 2d, Judges § 1.](#)

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[FN3] [Am. Jur. 2d, Justices of the Peace § 1.](#)

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[FN4] [State v. Loechner, 65 Neb. 814, 91 N.W. 874 \(1902\).](#)

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[FN5] [Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98, 89 A.L.R. 932 \(1933\); Dunbar v. Fant, 170 S.C. 414, 170 S.E. 460, 90 A.L.R. 1412 \(1933\).](#)

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[FN6] [Dunbar v. Fant, 170 S.C. 414, 170 S.E. 460, 90 A.L.R. 1412 \(1933\).](#)

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[FN7] [Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98, 89 A.L.R. 932 \(1933\).](#)

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[\[FN8\] Am. Jur. 2d, Attorneys at Law § 3.](#)

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## § 20. Legislative officers

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [1](#)

Legislative officers are those who belong to, and exercise the duties connected with, the legislative department of the government, and whose function it is to enact the laws.[\[FN1\]](#) State legislators are public officers,[\[FN2\]](#) although members of Congress have been deemed not to be federal officers.[\[FN3\]](#)

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[\[FN1\] State v. Loechner, 65 Neb. 814, 91 N.W. 874 \(1902\).](#)

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[\[FN2\] State ex rel. Grant v. Eaton, 114 Mont. 199, 133 P.2d 588 \(1943\).](#)

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[\[FN3\] § 16.](#)

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**§ 21. Ministerial or administrative officers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 1

A ministerial officer is one who performs ministerial acts, those being acts performed in obedience to authority without the exercise of judgment.[FN1] Thus, a ministerial officer is characterized in that he or she generally has no power to judge the matter to be done, and usually must obey some superior.[FN2]

Whether a person is a ministerial officer depends not so much on the character of the particular act which he or she may be called upon to perform, or whether he or she exercises a judgment or discretion with reference to such act, as upon the general nature and scope of the duties devolving upon him or her. If these are of a ministerial character, then the person charged with their performance is a ministerial officer.[FN3]

The word "ministerial" is frequently used as synonymous with "administrative,"[FN4] and therefore an administrative officer may be classed as a ministerial officer and vice versa.[FN5]

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[FN1] [Carlson v. City of Bozeman](#), 2001 MT 46, 304 Mont. 277, 20 P.3d 792 (2001).

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[FN2] [State v. Loechner](#), 65 Neb. 814, 91 N.W. 874 (1902).

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[FN3] [Renaker v. Thompson](#), 287 Ky. 241, 152 S.W.2d 575 (1941).

- As to the nature of ministerial duties, generally, see [§ 228](#).

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[FN4] [State v. Herrman](#), 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 (2d Dist. Montgomery County 1961).

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[\[FN5\] State v. Herrman, 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 \(2d Dist. Montgomery County 1961\).](#)

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## **§ 22. Lucrative offices; offices of profit or emolument**

### **West's Key Number Digest**

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Constitutional and statutory provisions directed at prohibiting the holding of more than one office at the same time[[FN1](#)] may contain provisions applying to "lucrative" offices, and offices of "profit" or "emolument."[[FN2](#)] A lucrative office,[[FN3](#)] or one of profit,[[FN4](#)] has been defined as an office to which there is attached a compensation[[FN5](#)] for services rendered.[[FN6](#)] While a position is not an office of profit when no compensation is provided for services rendered in and by virtue of the position,[[FN7](#)] any compensation, no matter how meager, renders an office lucrative.[[FN8](#)] Reimbursement for expenses alone, however, does not render an office lucrative, nor does the fact that expenses exceed compensation render an office lucrative.[[FN9](#)] The receipt of an automobile expense allowance does not make an office one of emolument.[[FN10](#)]

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[\[FN1\] § 67.](#)

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[\[FN2\] Begich v. Jefferson, 441 P.2d 27 \(Alaska 1968\); Richardson v. Town of Mount Pleasant, 350 S.C. 291, 566 S.E.2d 523 \(2002\); Pruitt v. Glen Rose Independent School Dist. No. 1, 126 Tex. 45, 84 S.W.2d 1004, 100 A.L.R. 1158 \(Comm'n App. 1935\).](#)

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[\[FN3\] Thompson v. Hays, 867 N.E.2d 654 \(Ind. Ct. App. 2007\), transfer denied, 878 N.E.2d 210 \(Ind. 2007\).](#)

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[\[FN4\] Opinion of the Clerk, 386 So. 2d 210 \(Ala. 1980\).](#)

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[\[FN5\] Opinion of the Clerk, 386 So. 2d 210 \(Ala. 1980\); Thompson v. Hays, 867 N.E.2d 654 \(Ind. Ct. App. 2007\), transfer denied, 878 N.E.2d 210 \(Ind. 2007\).](#)

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[\[FN6\] Thompson v. Hays, 867 N.E.2d 654 \(Ind. Ct. App. 2007\), transfer denied, 878 N.E.2d 210 \(Ind. 2007\).](#)

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[\[FN7\] Opinion of the Clerk, 386 So. 2d 210 \(Ala. 1980\).](#)

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[\[FN8\] Dawkins v. Meyer, 825 S.W.2d 444 \(Tex. 1992\).](#)

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[\[FN9\] Dawkins v. Meyer, 825 S.W.2d 444 \(Tex. 1992\).](#)

- The reimbursement without receipts for meals does not make a position a lucrative office. [In re Carlisle, 209 S.W.3d 93 \(Tex. 2006\).](#)

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[\[FN10\] State ex rel. Beicker v. Mycue, 481 S.W.2d 476 \(Tex. Civ. App. San Antonio 1972\).](#)

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## **§ 23. Generally**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 39, 45.1, 46

The concept of "de facto" officer is utilized to give legal effect to public acts done under the color of law by persons not officers de jure.[FN1] The de facto officer doctrine was engrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law.[FN2] Thus, the doctrine's purpose is to protect the public's reliance on an officer's authority and to ensure the orderly administration of government by preventing technical challenges to an officer's authority.[FN3]



To satisfy the de facto officer doctrine, the officer must be in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper.[FN4] A de facto official is one who by some color of right is in possession of an office, and for the time being performs his or her duties with public acquiescence, though having no right in fact;[FN5] or, as otherwise stated, a person is a de facto officer when he or she is in possession of an office and discharges its functions under color of authority,[FN6] without being actually qualified in law to so act.[FN7]

A person is considered a de facto officer where the duties of the office are exercised—  
— without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his or her action, supposing him or her to be the officer he or she assumed to be.[FN8]

— under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement, or condition.[FN9]

— under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.[FN10]

— under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.[FN11]

A de facto officer is not entitled to the emoluments of office where there is a de jure officer claiming the office.[FN12]

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[FN1] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985).

- The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. [Nguyen v. U.S.](#), 539 U.S. 69, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003).

- As to the validity of acts of a de facto officer, generally, see §§ [236](#), [237](#).

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[FN2] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985); [State v. Doyle](#), 156 N.H. 306, 940 A.2d 245 (2007); [Campbell v. Village of Green Tree](#), 59 N.M. 255, 282 P.2d 1101 (1955); [Matter of Stockwell](#), 28 Wash. App. 295, 622 P.2d 910 (Div. 1 1981).

- The de facto officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles. [Vroman v. City of Soldotna](#), 111 P.3d 343 (Alaska 2005).

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[FN3] [State v. Oren](#), 160 Vt. 245, 627 A.2d 337 (1993).

- The de facto officer doctrine rests on policies such as the promotion of governmental stability and efficiency and public reliance on authority, demanding that governmental actions not be hampered by collateral inquiries as to the legal status of the officer performing the acts. [Rawitz v. County of Essex](#), 347 N.J. Super. 590, 791 A.2d 314 (Law Div. 2000), aff'd, 347 N.J. Super. 570, 791 A.2d 226 (App. Div. 2002).

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[FN4] [State v. O'Reilly](#), 785 So. 2d 768 (La. 2001); [Com. v. Vaidulas](#), 433 Mass. 247, 741 N.E.2d 450 (2001); [State v. Oren](#), 160 Vt. 245, 627 A.2d 337 (1993).

- To qualify as a de facto officer, the officer's title need not be good in law but he or she must be in the unobstructed possession of the office and discharging its duties in full view of the public. [State v. Doyle](#), 156 N.H. 306, 940 A.2d 245 (2007).

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[\[FN5\] Aydelotte v. State, 85 Ark. App. 67, 146 S.W.3d 392 \(2004\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\).](#)

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[\[FN6\] State ex rel. Hayden v. Wyoming County Correctional Officer Civil Service Com'n, 186 W. Va. 239, 412 S.E.2d 237 \(1991\).](#)

- A de facto officer exercises the functions of an office under the color of title, in full view of the public, and in such a manner and under circumstances of reputation or acquiescence that would suggest no ineligibility. [The Florida Bar v. Sibley, 995 So. 2d 346 \(Fla. 2008\)](#), cert. denied, [129 S. Ct. 1348 \(2009\)](#).

- To be deemed a de facto officer when there is an office, all that is required is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such an officer under the color of an election or appointment, as the case may be. [Turley v. U.S., 503 F. Supp. 2d 912 \(N.D. Ohio 2007\)](#).

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[\[FN7\] Thompson v. Clatskanie Peoples Public Utility Dist., 35 Or. App. 843, 583 P.2d 26 \(1978\).](#)

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[\[FN8\] Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 6 P.3d 799 \(2000\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\); Huff v. Sauer, 243 Minn. 425, 68 N.W.2d 252 \(1955\); State v. Kidder, 169 Neb. 181, 98 N.W.2d 800 \(1959\); Baxter v. Danny Nicholson, Inc., 661 S.E.2d 892 \(N.C. Ct. App. 2008\).](#)

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[\[FN9\] Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 6 P.3d 799 \(2000\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\); Huff v. Sauer, 243 Minn. 425, 68 N.W.2d 252 \(1955\); State v. Kidder, 169 Neb. 181, 98 N.W.2d 800 \(1959\); Baxter v. Danny Nicholson, Inc., 661 S.E.2d 892 \(N.C. Ct. App. 2008\).](#)

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[\[FN10\] In re Estate of de Escandon, 215 Ariz. 247, 159 P.3d 557 \(Ct. App. Div. 1 2007\)](#), review denied, (Oct. 30, 2007); [Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 6 P.3d 799 \(2000\); Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546, 539 P.2d 1 \(1975\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\); McCollough v. Douglas County, 150 Neb. 389, 34 N.W.2d 654 \(1948\); City of Hoboken v. City of Jersey City, 347 N.J. Super. 279, 789 A.2d 668 \(Law Div. 2001\).](#)

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[\[FN11\] Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 6 P.3d 799 \(2000\); Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546, 539 P.2d 1 \(1975\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\); McCollough v. Douglas County, 150 Neb. 389, 34 N.W.2d 654 \(1948\); Baxter v. Danny Nicholson, Inc., 661 S.E.2d 892 \(N.C. Ct. App. 2008\).](#)

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[\[FN12\] Butler v. Cocke County, 671 S.W.2d 847 \(Tenn. Ct. App. 1984\).](#)

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**§ 24. Distinctions from de jure officer or usurper or intruder**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 39

An officer de facto differs from an officer de jure who is, in all respects, legally appointed and qualified to exercise the office,[FN1] while a de facto officer goes into the office under the color of authority.[FN2] Active possession, despite a defect in title, distinguishes a de facto office holder from a de jure office holder.[FN3] Thus, the difference between the basis of authority of a de jure officer and that of a de facto officer is that one rests on right and the other on reputation.[FN4] Furthermore, an officer de facto differs from an officer de jure, in that an officer de facto may be ousted in a direct proceeding against him or her, while an officer de jure may not.[FN5]

A de facto officer also is distinguished from a mere usurper or intruder in office who takes possession of an office and undertakes to act officially without any authority, either actual or apparent.[FN6] Color of title distinguishes a de facto officer from a usurper.[FN7] The acts of a usurper or intruder in office are absolutely void, and may be impeached at any time in any proceeding.[FN8]

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[FN1] [In re Succession of Sampognaro](#), 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).

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[FN2] [Baxter v. Danny Nicholson, Inc.](#), 661 S.E.2d 892 (N.C. Ct. App. 2008).

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[FN3] [Barrett-Smith v. Barrett-Smith](#), 110 Wash. App. 87, 38 P.3d 1030 (Div. 2 2002).

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[FN4] [Ridout v. State](#), 161 Tenn. 248, 30 S.W.2d 255, 71 A.L.R. 830 (1930).

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[FN5] [State ex rel. Purola v. Cable](#), 48 Ohio St. 2d 239, 2 Ohio Op. 3d 410, 358 N.E.2d 537 (1976).

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[FN6] [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978).

- An officer de facto differs from a mere usurper of an office who undertakes to act as an officer without color or right. [In re Succession of Sampognaro](#), 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).

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[FN7] [Barrett-Smith v. Barrett-Smith](#), 110 Wash. App. 87, 38 P.3d 1030 (Div. 2 2002).

- An officer de facto holds office by some color of right or title, while a mere usurper or intruder intrudes on the office and assumes to exercise its functions without legal title or color of right thereto. [Benne v. ABB Power T](#)

[& D Co., 106 S.W.3d 595 \(Mo. Ct. App. W.D. 2003\).](#)

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[\[FN8\] People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 \(1978\).](#)

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## § 25. Officers within scope of doctrine

### West's Key Number Digest

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The de facto doctrine has been invoked with regard to a wide variety of public officials, such as, county correctional officer civil service commissioners,[\[FN1\]](#) police officers,[\[FN2\]](#) and those who act as finders of fact.[\[FN3\]](#) Furthermore, judicial, as well as ministerial, officers may be officers de facto.[\[FN4\]](#)

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[\[FN1\] State ex rel. Hayden v. Wyoming County Correctional Officer Civil Service Com'n, 186 W. Va. 239, 412 S.E.2d 237 \(1991\).](#)

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[\[FN2\] Jarrett v. State, 926 So. 2d 429 \(Fla. Dist. Ct. App. 2d Dist. 2006\).](#)

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[\[FN3\] State Dental Council and Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 \(1974\).](#)

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[FN4] [Com. v. Di Stasio, 297 Mass. 347, 8 N.E.2d 923, 113 A.L.R. 1133 \(1937\)](#); [People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 \(1978\)](#); [Ridout v. State, 161 Tenn. 248, 30 S.W.2d 255, 71 A.L.R. 830 \(1930\)](#).

- The reasons for introduction of the doctrine of de facto officers into the law are sufficient basis for extending it to courts whose creation is authorized by law, but defectively done. [Landthrip v. City of Beebe, 268 Ark. 45, 593 S.W.2d 458 \(1980\)](#).

- As to de facto judges, generally, see [Am. Jur. 2d, Judges §§ 231 et seq.](#)

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## § 26. Status of officers appointed by de facto officer

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 39

While the courts generally agree that the acts of a de facto officer are valid as to the public and third persons,[FN1] they are not in full accord as to whether an appointee of a de facto officer becomes a de jure, or only a de facto, officer by such appointment. Some cases have held that such appointees are de facto and not de jure officers,[FN2] on the ground that, as between themselves, the appointer and the appointees stand upon the same footing.[FN3] Other cases, however, have taken the position that a person appointed by a de facto officer or by a board containing a de facto member whose vote was necessary to appoint the person, is a de jure officer.[FN4] This view is an application of the rule that the acts of de facto officers are valid as against third persons or the public generally, it being argued that an appointed official should not be required, before accepting a position, to assume the burden of investigating the legal status of those who hire him or her, so long

as they are exercising the functions of their offices and are generally recognized as being the proper ones to hold the office.[FN5]

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[\[FN1\] § 237.](#)

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[\[FN2\] Board of Ed. of McCreary County v. Nevels, 551 S.W.2d 15 \(Ky. Ct. App. 1977\); Von Nieda v. Bennett, 117 N.J.L. 231, 187 A. 629, 106 A.L.R. 1320 \(N.J. Ct. Err. & App. 1936\); Application of Stephan, 2 Misc. 2d 6, 150 N.Y.S.2d 359 \(Sup 1956\); State ex rel. Scanes v. Babb, 124 W. Va. 428, 20 S.E.2d 683 \(1942\).](#)

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[\[FN3\] Board of Ed. of McCreary County v. Nevels, 551 S.W.2d 15 \(Ky. Ct. App. 1977\).](#)

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[\[FN4\] State ex rel. James v. Deakyne, 44 Del. 217, 58 A.2d 129 \(Super. Ct. 1948\); State ex rel. Purola v. Cable, 48 Ohio St. 2d 239, 2 Ohio Op. 3d 410, 358 N.E.2d 537 \(1976\).](#)

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[\[FN5\] State ex rel. James v. Deakyne, 44 Del. 217, 58 A.2d 129 \(Super. Ct. 1948\).](#)

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**§ 27. Existence of de jure office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [40](#)

As a general proposition there is no such thing as a de facto office,[FN1] as distinguished from a de facto officer,[FN2] so there must be a de jure office in order for there to be a de facto officer.[FN3] Under this rule, if the legislature provides for an office or board which requires local legislation to implement the position, there can be no de jure office and, thus, no de facto holder of such, unless the local legislation exercises its authority to implement the legislation.[FN4] It does not matter, under this view, that the supposed officer has been functioning as such for many years, since where no office legally exists, the pretended officer is merely a usurper to whose acts no validity can be attached.[FN5]

On the other hand, there is authority for the position that the general rule will not be followed where strict adherence to the rule would lead to uncertainty, chaos, and confusion,[FN6] great public inconvenience,[FN7] or great hardship to litigants.[FN8] Thus, where an office is provided for by an unconstitutional statute, the incumbent, for the sake of public policy and the protection of private rights, will be recognized as an officer de facto until the unconstitutionality of the act has been judicially determined.[FN9] Furthermore, in some instances, the de facto status of persons acting as incumbents of offices has been upheld after such offices were abolished.[FN10] De facto status has been accorded an officer occupying an office authorized by law but defectively organized, such as where the legislature provided for a public office, but a city did not enact legislation organizing the office, as required by statute.[FN11] One's de facto status has also been sustained where there were more persons assuming to fill offices of a particular denomination than there were legal offices.[FN12]

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[FN1] Lile v. City of Powderly, 612 S.W.2d 762 (Ky. Ct. App. 1981); Kovalycsik v. City of Garfield, 58 N.J. Super. 229, 156 A.2d 31 (App. Div. 1959); Jones v. State Bd. of Trustees of Emp. Retirement System of Texas, 505 S.W.2d 361 (Tex. Civ. App. Dallas 1974); Higgins v. Salewsky, 17 Wash. App. 207, 562 P.2d 655 (Div. 1 1977).

[FN2] Higgins v. Salewsky, 17 Wash. App. 207, 562 P.2d 655 (Div. 1 1977).

[FN3] State ex rel. James v. Deakyne, 44 Del. 217, 58 A.2d 129 (Super. Ct. 1948); Tobler v. Beckett, 297 So. 2d 59 (Fla. Dist. Ct. App. 2d Dist. 1974); Beck v. State, 283 Ga. 352, 658 S.E.2d 577 (2008); Grooms v. LaVale Zoning Bd., 27 Md. App. 266, 340 A.2d 385 (1975); State ex rel. Tamminen v. City of Eveleth, 189 Minn. 229, 249 N.W. 184, 99 A.L.R. 289 (1933); State ex rel. Farmer v. Edmonds Municipal Court of Snohomish County, 27 Wash. App. 762, 621 P.2d 171 (1980); State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 (1970).

- For the acts of a de facto official to be valid, the office involved must exist as a de jure office. In re Succession of Sampognaro, 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).

[FN4] Jones v. State Bd. of Trustees of Emp. Retirement System of Texas, 505 S.W.2d 361 (Tex. Civ. App. Dallas 1974).

[FN5] Jones v. State Bd. of Trustees of Emp. Retirement System of Texas, 505 S.W.2d 361 (Tex. Civ. App. Dallas 1974).

[FN6] Landthrip v. City of Beebe, 268 Ark. 45, 593 S.W.2d 458 (1980); In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Rath v. LaFon, 1967 OK 52, 431 P.2d 312 (Okla. 1967).

[FN7] State ex rel. Nelson v. Jordan, 104 Ariz. 193, 450 P.2d 383 (1969).

[FN8] Rath v. LaFon, 1967 OK 52, 431 P.2d 312 (Okla. 1967).

[\[FN9\] Dawson v. Bomar, 322 F.2d 445 \(6th Cir. 1963\); State v. O'Reilly, 785 So. 2d 768 \(La. 2001\); Kimble v. Bender, 173 Md. 608, 196 A. 409 \(1938\); Marckel Co. v. Zitzow, 218 Minn. 305, 15 N.W.2d 777 \(1944\); In re Santillanes, 47 N.M. 140, 138 P.2d 503 \(1943\); State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 \(1975\); Matter of Stockwell, 28 Wash. App. 295, 622 P.2d 910 \(Div. 1 1981\).](#)

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[\[FN10\] Lively v. Board of Education of Kanawha County, 115 W. Va. 314, 175 S.E. 784 \(1934\).](#)

- Where the position of state auditor was abolished by a constitutional amendment, the state auditor, in order to avoid great public inconvenience, continued to act as a de facto officer and was entitled to discharge the duties of the office and to the emoluments thereof until succeeded by a Commissioner of Finance, a newly created office, in the manner provided by law. [State ex rel. Nelson v. Jordan, 104 Ariz. 193, 450 P.2d 383 \(1969\).](#)

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[\[FN11\] Landthrip v. City of Beebe, 268 Ark. 45, 593 S.W.2d 458 \(1980\).](#)

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[\[FN12\] Adams v. Goldner, 156 N.J. Super. 299, 383 A.2d 1149 \(App. Div. 1978\), judgment aff'd, 79 N.J. 78, 397 A.2d 1088 \(1979\).](#)

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**§ 28. Color of authority, title, law, or right**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [41](#)



A person is an officer de facto where he or she is in possession of an office[[FN1](#)] and discharges its functions or performs its duties under color of authority[[FN2](#)] or, as some cases have stated, under color of title,[[FN3](#)] color of law,[[FN4](#)] color of right,[[FN5](#)] or under color of appointment or election.[[FN6](#)]

Although color of authority or right may be acquired in various ways, the term generally refers to the authority derived from a definite election or appointment, however irregular or informal.[[FN7](#)] An illegal election may furnish the necessary color of title sufficient to give the incumbent standing as a de facto officer, under certain circumstances,[[FN8](#)] as may the general reputation that a particular person is the lawful incumbent of the office in question, although no election or appointment of such officer is known to have taken place.[[FN9](#)]

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[\[FN1\] § 29.](#)

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[\[FN2\] State v. Miller, 222 Kan. 405, 565 P.2d 228 \(1977\); State ex rel. Hayden v. Wyoming County Correctional Officer Civil Service Com'n, 186 W. Va. 239, 412 S.E.2d 237 \(1991\).](#)

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[\[FN3\] The Florida Bar v. Sibley, 995 So. 2d 346 \(Fla. 2008\), cert. denied, 129 S. Ct. 1348 \(2009\); Arnold v. Mt. Carmel Public Utility, 369 Ill. App. 3d 1029, 308 Ill. Dec. 450, 861 N.E.2d 1015 \(5th Dist. 2006\); Forwood v. City of Taylor, 208 S.W.2d 670 \(Tex. Civ. App. Austin 1948\), judgment aff'd, 147 Tex. 161, 214 S.W.2d 282 \(1948\); Foisy v. Conroy, 101 Wash. App. 36, 4 P.3d 140 \(Div. 1 2000\).](#)

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[\[FN4\] Landthrip v. City of Beebe, 268 Ark. 45, 593 S.W.2d 458 \(1980\).](#)

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[\[FN5\] State v. Whelan, 103 Idaho 651, 651 P.2d 916 \(1982\); Grooms v. LaVale Zoning Bd., 27 Md. App. 266, 340 A.2d 385 \(1975\); Benne v. ABB Power T & D Co., 106 S.W.3d 595 \(Mo. Ct. App. W.D. 2003\); People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 \(1978\); State v. Vogh, 179 Or. App. 585, 41 P.3d 421 \(2002\); Schoonover v. City of Viroqua, 245 Wis. 239, 14 N.W.2d 9 \(1944\).](#)

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[\[FN6\] Gwin v. State, 808 So. 2d 65 \(Ala. 2001\); Joyce v. Town of Tainter, 232 Wis. 2d 349, 2000 WI App 15, 606 N.W.2d 284 \(Ct. App. 1999\).](#)

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[\[FN7\] U.S. v. Royer, 61 Ct. Cl. 1030, 268 U.S. 394, 45 S. Ct. 519, 69 L. Ed. 1011 \(1925\); Carty v. State, 421 N.E.2d 1151 \(Ind. Ct. App. 1981\); Grooms v. LaVale Zoning Bd., 27 Md. App. 266, 340 A.2d 385 \(1975\).](#)

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[\[FN8\] § 31.](#)

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[\[FN9\] § 30.](#)

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**§ 29. Possession of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 39

For a person to be a de facto officer, he or she must be in possession of an office.[\[FN1\]](#) Such possession must be physical,[\[FN2\]](#) actual,[\[FN3\]](#) and unobstructed.[\[FN4\]](#) The mere fact that a person occupies an office, however, does not, without more, make him or her a de facto officer.[\[FN5\]](#)

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[\[FN1\]](#) [Aydelotte v. State](#), 85 Ark. App. 67, 146 S.W.3d 392 (2004); [Carty v. State](#), 421 N.E.2d 1151 (Ind. Ct. App. 1981); [State v. Vogh](#), 179 Or. App. 585, 41 P.3d 421 (2002); [State ex rel. Hayden v. Wyoming County Correctional Officer Civil Service Com'n](#), 186 W. Va. 239, 412 S.E.2d 237 (1991); [Joyce v. Town of Tainter](#), 232 Wis. 2d 349, 2000 WI App 15, 606 N.W.2d 284 (Ct. App. 1999).

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[\[FN2\]](#) [In re Succession of Sampognaro](#), 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).

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[\[FN3\]](#) [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [Barrett-Smith v. Barrett-Smith](#), 110 Wash. App. 87, 38 P.3d 1030 (Div. 2 2002).

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[\[FN4\]](#) [State v. O'Reilly](#), 785 So. 2d 768 (La. 2001); [Com. v. Vaidulas](#), 433 Mass. 247, 741 N.E.2d 450 (2001); [State v. Doyle](#), 156 N.H. 306, 940 A.2d 245 (2007).

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[\[FN5\]](#) [Equal Employment Opportunity Commission v. Sears, Roebuck & Co.](#), 504 F. Supp. 241 (N.D. Ill. 1980), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (rejected on other grounds by, [E.E.O.C. v. General Telephone Co. of Northwest, Inc.](#), 885 F.2d 575 (9th Cir. 1989)).

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**§ 30. Recognition or reputation as, and reliance on, officer**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 39

One who is recognized and accepted as a rightful holder of the office by all who deal with him or her,[[FN1](#)] or has the reputation of being the officer he or she assumes to be,[[FN2](#)] although he or she is not such in point of law, and is in possession of the office and claims to be entitled to perform its duties, is generally considered as being an officer de facto.[[FN3](#)] Thus, the general reputation that a particular person is the lawful incumbent of the office in question may serve as adequate color of title for one to be considered a de facto officer, even though no election or appointment of such officer is known to have taken place.[[FN4](#)]

Reputation and general recognition may be based on the mere performance of the duties of the office for a sufficient length of time to imply that there must have been an appointment or election although it is only presumed and the occasion is unknown.[[FN5](#)] In other words, a person may, irrespective of any question of appointment or election, become an officer de facto where he or she has acted under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or to invoke his or her action in the supposition that he or she is in truth the officer that he or she assumes to be.[[FN6](#)]

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[[FN1](#)] [State v. Miller](#), 222 Kan. 405, 565 P.2d 228 (1977).

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[[FN2](#)] [In re Succession of Sampognaro](#), 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).

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[[FN3](#)] [Olathe Hospital Foundation, Inc. v. Extendicare, Inc.](#), 217 Kan. 546, 539 P.2d 1 (1975); [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [Huff v. Sauer](#), 243 Minn. 425, 68 N.W.2d 252 (1955); [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978); [State ex rel. Witten v. Ferguson](#), 148 Ohio St. 702, 36 Ohio Op. 285, 76 N.E.2d 886 (1947); [State v. London](#), 194 Wash. 458, 78 P.2d 548, 115 A.L.R. 1255 (1938).

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[[FN4](#)] [People v. Davis](#), 86 Mich. App. 514, 272 N.W.2d 707 (1978); [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978).

- As to color of title, see [§ 28](#).

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[FN5] [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [State ex rel. Witten v. Ferguson](#), 148 Ohio St. 702, 36 Ohio Op. 285, 76 N.E.2d 886 (1947).

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[FN6] [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978).

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## **§ 31. Irregular or illegal election**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 42

An illegal election may furnish the necessary color of title sufficient to give an incumbent standing as a de facto officer,[FN1] where such election is consistent with an honest misapprehension of the law, and not evidence of a palpable disregard of its provisions.[FN2] A public official may be rendered an officer de facto where he or she is holding office under the color of a known election improper because there was a want of power in the electing body, or by reason of some defect or irregularity in its exercise.[FN3]

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[FN1] [U.S. v. Royer](#), 61 Ct. Cl. 1030, 268 U.S. 394, 45 S. Ct. 519, 69 L. Ed. 1011 (1925).

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[\[FN2\] Rainwater v. State ex rel. Strickland, 237 Ala. 482, 187 So. 484, 121 A.L.R. 981 \(1939\); Gonzalez v. Duran, 250 S.W.2d 322 \(Tex. Civ. App. San Antonio 1952\)](#), writ refused.

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[\[FN3\] Butler v. Cocke County, 671 S.W.2d 847 \(Tenn. Ct. App. 1984\)](#).

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## § 32. Informal, defective, or invalid appointment

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 42

When an official person or body has apparent authority to appoint an individual to a public office, and apparently exercises such authority, and the person so appointed enters such office and performs its duties, he or she will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so,[\[FN1\]](#) or that the power was exercised in an irregular manner.[\[FN2\]](#) Thus, although the confirmation of an appointed public officer in violation of statutory authority will render the appointment a nullity, the office holder will serve in a de facto capacity.[\[FN3\]](#)

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[\[FN1\] Rockingham County v. Luten Bridge Co., 35 F.2d 301, 66 A.L.R. 735 \(C.C.A. 4th Cir. 1929\); Reed v. President and Com'rs of Town of North East, 226 Md. 229, 172 A.2d 536 \(1961\); Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 \(1961\); Butler v. Cocke County, 671 S.W.2d 847 \(Tenn. Ct. App. 1984\); Jackson v. Maypearl Independent School Dist., 392 S.W.2d 892 \(Tex. Civ. App. Waco 1965\).](#)

- Warrants issued by a special prosecutor were valid under the de facto doctrine, though his incumbency was illegal, because the circuit judge who appointed him did not have the power to appoint him for the purposes for which he was appointed. [People v. Davis, 86 Mich. App. 514, 272 N.W.2d 707 \(1978\)](#).

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[FN2] [U.S. v. Royer, 61 Ct. Cl. 1030, 268 U.S. 394, 45 S. Ct. 519, 69 L. Ed. 1011 \(1925\)](#); [Gasper v. District Court of Seventh Judicial Dist., in and for Canyon County, 74 Idaho 388, 264 P.2d 679 \(1953\)](#); [State v. Miller, 222 Kan. 405, 565 P.2d 228 \(1977\)](#); [McKenna v. Nichols, 295 Ky. 778, 175 S.W.2d 121 \(1943\)](#); [State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner, 118 Ohio St. 3d 515, 2008-Ohio-2824, 890 N.E.2d 888 \(2008\)](#); [Butler v. Cocke County, 671 S.W.2d 847 \(Tenn. Ct. App. 1984\)](#); [Bingham v. State, 163 Tex. Crim. 352, 290 S.W.2d 915 \(1956\)](#).

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[FN3] [Cotton v. City of Elma, 100 Wash. App. 685, 998 P.2d 339 \(Div. 2 2000\)](#).

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### § 33. Failure to meet qualifications of office

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 43

Where an office exists under the law, and a person is elected or appointed to fill it and enters in the discharge of his or her official duties, he or she is a de facto officer, and his or her acts are valid, although he or she is ineligible or otherwise does not possess all the necessary qualifications for the office.[FN1] Thus, de facto status has been upheld where an official was ineligible to hold office because of age,[FN2] and where

members of public boards, in violation of statute, were not of a particular occupation[[FN3](#)] or held another public office within a specified period of time preceding their appointment.[[FN4](#)] Even if the person is ineligible to hold any civil office whatsoever in the state, his or her official acts, while holding a commission as a public officer, are valid as the acts of an officer de facto.[[FN5](#)] A person may be a de facto officer when the only defect in his or her title is due to his or her failure to perform some step required to perfect his or her legal title to the office, such as taking an oath,[[FN6](#)] the filing of the officer's appointment,[[FN7](#)] the giving of a proper bond, or the like.[[FN8](#)]

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[[FN1](#)] [Carty v. State](#), 421 N.E.2d 1151 (Ind. Ct. App. 1981); [State v. Miller](#), 222 Kan. 405, 565 P.2d 228 (1977); [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978); [State ex rel. Purola v. Cable](#), 48 Ohio St. 2d 239, 2 Ohio Op. 3d 410, 358 N.E.2d 537 (1976); [D and B Auto Sales v. Com., Dept. of State, State Bd. of Motor Vehicle Manufacturers, Dealers and Salesmen](#), 29 Pa. Commw. 113, 370 A.2d 428 (1977); [Vick v. City of Waco](#), 614 S.W.2d 861 (Tex. Civ. App. Waco 1981), writ refused n.r.e., (July 22, 1981).

- Official actions are considered de facto valid when the defect of authority is merely technical, and whether an officer is in fact ineligible to hold the office is immaterial. [Vroman v. City of Soldotna](#), 111 P.3d 343 (Alaska 2005).

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[[FN2](#)] [People ex rel. Duncan v. Beach](#), 294 N.C. 713, 242 S.E.2d 796 (1978).

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[[FN3](#)] [D and B Auto Sales v. Com., Dept. of State, State Bd. of Motor Vehicle Manufacturers, Dealers and Salesmen](#), 29 Pa. Commw. 113, 370 A.2d 428 (1977).

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[[FN4](#)] [Vick v. City of Waco](#), 614 S.W.2d 861 (Tex. Civ. App. Waco 1981), writ refused n.r.e., (July 22, 1981).

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[[FN5](#)] [Health Facility Investments v. Georgia Dept. of Human Resources](#), 238 Ga. 383, 233 S.E.2d 351 (1977).

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[[FN6](#)] [Malone v. State](#), 406 So. 2d 1060 (Ala. Crim. App. 1981), writ denied, 406 So. 2d 1066 (Ala. 1981); [Town of Stratford v. Council 15, Local 407, AFSCME](#), 3 Conn. App. 590, 490 A.2d 1021 (1985); [The Florida Bar v. Sibley](#), 995 So. 2d 346 (Fla. 2008), cert. denied, 129 S. Ct. 1348 (2009); [State v. Whelan](#), 103 Idaho 651, 651 P.2d 916 (1982); [Reed v. President and Com'rs of Town of North East](#), 226 Md. 229, 172 A.2d 536 (1961); [Prucka v. Eastern Sarpy Drainage Dist.](#), 157 Neb. 284, 59 N.W.2d 761 (1953); [Stockton v. N.M. Taxation & Revenue Dept.](#), 141 N.M. 860, 2007-NMCA-071, 161 P.3d 905 (Ct. App. 2007); [In re G. V.](#), 136 Vt. 499, 394 A.2d 1126 (1978).

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[[FN7](#)] [In re G. V.](#), 136 Vt. 499, 394 A.2d 1126 (1978).

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[[FN8](#)] [Malone v. State](#), 406 So. 2d 1060 (Ala. Crim. App. 1981), writ denied, 406 So. 2d 1066 (Ala. 1981); [Town of Stratford v. Council 15, Local 407, AFSCME](#), 3 Conn. App. 590, 490 A.2d 1021 (1985); [State v. Whelan](#), 103 Idaho 651, 651 P.2d 916 (1982); [Olathe Hospital Foundation, Inc. v. Extendicare, Inc.](#), 217 Kan. 546, 539 P.2d 1 (1975); [Prucka v. Eastern Sarpy Drainage Dist.](#), 157 Neb. 284, 59 N.W.2d 761 (1953); [Stockton v. N.M. Taxation & Revenue Dept.](#), 141 N.M. 860, 2007-NMCA-071, 161 P.3d 905 (Ct. App. 2007).

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## § 34. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 44

Where an officer under color of right or title continues in the exercise of the functions and duties of the office without legal authority after his or her term of office has expired or after his or her authority to act has ceased, he or she is an officer de facto.[[FN1](#)]

**Observation:** A distinction exists between one who holds over without any legal right to do so, thereby becoming a de facto officer, and one who has the legal right, after the expiration of his or her term, to continue in office until his or her successor has qualified; where the officer continues to have the legal right to hold office, the officer holding over is an officer de jure and not de facto.[[FN2](#)] Similarly, an officer who is elected to succeed himself or herself and fails to qualify for a second term is an officer de jure and not de facto.[[FN3](#)]

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[[FN1](#)] [State ex rel. Gebelein v. Killen](#), 454 A.2d 737 (Del. 1982) (disavowed on other grounds by, [State, ex rel. Oberly v. Troise](#), 526 A.2d 898 (Del. 1987)); [Cantwell v. City of Southfield](#), 95 Mich. App. 375, 290 N.W.2d 151 (1980); [Gillson v. Heffernan](#), 40 N.J. 367, 192 A.2d 577 (1963); [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 (1935); [Ridout v. State](#), 161 Tenn. 248, 30 S.W.2d 255, 71 A.L.R. 830 (1930); [State ex rel. Thompson v. Gibson](#), 22 Wis. 2d 275, 125 N.W.2d 636 (1964).

[[FN2](#)] [Walker v. Hughes](#), 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 (1944); [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [Cantwell v. City of Southfield](#), 95 Mich. App. 375, 290 N.W.2d 151 (1980); [Delamora v. State](#), 128 S.W.3d 344 (Tex. App. Austin 2004), petition for discretionary review refused, (July 28, 2004); [State ex rel. Warder v. Gainer](#), 153 W. Va. 35, 167 S.E.2d 290 (1969).

- As to the right of a public officer to hold over on the expiration of his or her term until his or her successor has



qualified, see §§ [147](#) to [150](#).

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[FN3] [Delamora v. State, 128 S.W.3d 344 \(Tex. App. Austin 2004\)](#), petition for discretionary review refused, (July 28, 2004).

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## § 35. Ineligibility arising during term of office

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [44](#)

A de jure officer who becomes ineligible to hold the office during the term of office becomes a de facto officer until ousted in an appropriate proceeding.[FN1] This rule has been applied when an officer of a city moved beyond the city limits,[FN2] and when an officer automatically became retired when the officer reached the mandatory retirement age.[FN3] It has also been applied to an officer convicted of conspiring to demand and receive cash in return for favorable consideration with regard to an official act, where a law provided that a person convicted of a crime involving moral turpitude must forfeit his or her office, it being held that the officer, as the de facto occupant of the office, was entitled to exercise in good faith the rights and duties incident thereto until it was adjudged by a competent tribunal that the officer had forfeited the office by reason of the conviction.[FN4]

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[FN1] [State ex rel. James v. Deakyne](#), 44 Del. 217, 58 A.2d 129 (Super. Ct. 1948); [State ex rel. Booth v. Byington](#), 168 So. 2d 164 (Fla. Dist. Ct. App. 1st Dist. 1964), judgment aff'd, 178 So. 2d 1 (Fla. 1965); [Com. ex rel. Breckinridge v. Winstead](#), 430 S.W.2d 647 (Ky. 1968); [Galloway v. Council of Clark Tp.](#), 94 N.J. Super. 527, 229 A.2d 279 (App. Div. 1967).

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[FN2] [State ex rel. James v. Deakyne](#), 44 Del. 217, 58 A.2d 129 (Super. Ct. 1948).

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[FN3] [State ex rel. Booth v. Byington](#), 168 So. 2d 164 (Fla. Dist. Ct. App. 1st Dist. 1964), judgment aff'd, 178 So. 2d 1 (Fla. 1965).

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[FN4] [Galloway v. Council of Clark Tp.](#), 94 N.J. Super. 527, 229 A.2d 279 (App. Div. 1967).

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## § 36. Acceptance of incompatible office

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 44

There is authority that an officer holding over, notwithstanding the ending of his or her tenure by acceptance of an incompatible office, is not an officer de facto.[FN1] There is other authority, however, supporting the view that the officer, in such circumstances, becomes a de facto officer as to the first office, at least insofar as third persons and the public are concerned.[FN2]

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[FN1] [State v. Cook, 273 N.C. 377, 160 S.E.2d 49 \(1968\)](#); [Pruitt v. Glen Rose Independent School Dist. No. 1, 126 Tex. 45, 84 S.W.2d 1004, 100 A.L.R. 1158 \(Comm'n App. 1935\)](#).

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[FN2] [Gryzik v. State, 380 So. 2d 1102 \(Fla. Dist. Ct. App. 1st Dist. 1980\)](#); [Trimble County Fiscal Court v. Trimble County Bd. of Health, 587 S.W.2d 276 \(Ky. Ct. App. 1979\)](#); [In re F—— C——, 484 S.W.2d 21 \(Mo. Ct. App. 1972\)](#).

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## § 37. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 47

Among the principal aides to public officers are deputies and assistants, although the two positions are not the same or equivalent.[FN1] An assistant is one who aids, helps, or assists, while a deputy is a person appointed to act for another, as a substitute.[FN2] A deputy exercises the office in his or her principal's right or name, and the deputy's acts are of equal force with those of the officer himself or herself.[FN3] While ministerial acts may be delegated by an officer to assistants whose employment is authorized, they do not have the status of deputies to whom quasi-judicial functions may be delegated.[FN4]

The name "deputy" in an official's name is not conclusive that he or she is in fact a deputy.[FN5] Thus, a person whose duties indicate that he or she is in fact an independent officer and not a servant of the officer who appointed him or her is not a deputy, notwithstanding that the word "deputy" is used in his or her title.[FN6]

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[FN1] [Martindale v. Honey](#), 259 Ark. 416, 533 S.W.2d 198 (1976).

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[FN2] [Martindale v. Honey](#), 259 Ark. 416, 533 S.W.2d 198 (1976).

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[FN3] [Sanchez v. Murphy](#), 385 F. Supp. 1362 (D. Nev. 1974); [Martindale v. Honey](#), 259 Ark. 416, 533 S.W.2d 198 (1976); [Blackburn v. Brorein](#), 70 So. 2d 293 (Fla. 1954).

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[FN4] [Larson v. State](#), 564 P.2d 365 (Alaska 1977); [State Tax Commission of Utah v. Katsis](#), 90 Utah 406, 62 P.2d 120, 107 A.L.R. 1477 (1936).

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[\[FN5\] Sanchez v. Murphy, 385 F. Supp. 1362 \(D. Nev. 1974\).](#)

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[\[FN6\] Sanchez v. Murphy, 385 F. Supp. 1362 \(D. Nev. 1974\).](#)

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## § 38. Appointment of deputies

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [47](#)

While statutory authority is not necessary to enable a public official to appoint sufficient deputies to perform the duties of his or her office,[\[FN1\]](#) the appointment of deputies is frequently governed by statutes.[\[FN2\]](#) Under some statutes, the appointment of a deputy by a public officer must receive court approval.[\[FN3\]](#)

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[\[FN1\] McGrain v. Daugherty, 273 U.S. 135, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 \(1927\); Blackburn v. Brorein, 70 So. 2d 293 \(Fla. 1954\).](#)

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[\[FN2\] Larson v. State, 564 P.2d 365 \(Alaska 1977\); Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 \(1976\); State ex rel. Christian v. St. Clair, 153 W. Va. 1, 166 S.E.2d 785 \(1969\).](#)

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[\[FN3\] State ex rel. Christian v. St. Clair, 153 W. Va. 1, 166 S.E.2d 785 \(1969\).](#)

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## § 39. Duration of term and removal of deputies

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 47

In the absence of some statutory provision to the contrary, the commission or appointment of a deputy officer runs or continues only during the term of the officer making the appointment.<sup>[FN1]</sup> Thus, upon the death or disqualification of the officer, the term of his or her deputy terminates,<sup>[FN2]</sup> since there can be no deputy without there being a principal.<sup>[FN3]</sup> If, however, the governing body requests the deputy to maintain the office and perform ministerial tasks following the death of his or her principal, he or she becomes an employee of the governing body and is entitled to compensation.<sup>[FN4]</sup>

In the absence of a statute to the contrary, the principal has the right, at his or her pleasure, to remove his or her deputy.<sup>[FN5]</sup>

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[FN1] [Roberts v. State ex rel. Jackson County Bd. of Com'rs](#), 151 Ind. App. 83, 278 N.E.2d 285 (1972); [Ross v. Hanson](#), 227 A.2d 606 (Me. 1967).

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[FN2] [Blackburn v. Brorein](#), 70 So. 2d 293 (Fla. 1954); [Roberts v. State ex rel. Jackson County Bd. of Com'rs](#), 151 Ind. App. 83, 278 N.E.2d 285 (1972).

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[FN3] [Roberts v. State ex rel. Jackson County Bd. of Com'rs](#), 151 Ind. App. 83, 278 N.E.2d 285 (1972).

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[\[FN4\] Roberts v. State ex rel. Jackson County Bd. of Com'rs, 151 Ind. App. 83, 278 N.E.2d 285 \(1972\).](#)

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[\[FN5\] Roberts v. State ex rel. Jackson County Bd. of Com'rs, 151 Ind. App. 83, 278 N.E.2d 285 \(1972\); State ex rel. Christian v. St. Clair, 153 W. Va. 1, 166 S.E.2d 785 \(1969\).](#)

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## **§ 40. Status, functions, and conduct of deputies**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [47](#)

A deputy is generally considered a public officer,[\[FN1\]](#) especially where the appointment is permanent and not merely casual for a special service, and where he or she is required to take an oath of office.[\[FN2\]](#)

The business and object of a deputy is to perform the duties of his or her principal,[\[FN3\]](#) with the qualification that, as a general rule, powers conferred upon officers which involve the exercise of judgment or discretion cannot be surrendered or delegated to subordinates in the absence of statutory authorization.[\[FN4\]](#) The acts of a deputy are considered as the acts of his or her principal,[\[FN5\]](#) for which the principal is responsible.

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[\[FN1\] Larson v. State, 564 P.2d 365 \(Alaska 1977\); Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 \(1976\); Dosker v. Andrus, 342 Mich. 548, 70 N.W.2d 765 \(1955\).](#)

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[\[FN2\] Larson v. State, 564 P.2d 365 \(Alaska 1977\); Oklahoma City v. Century Indem. Co., 1936 OK 589, 178 Okla. 212, 62 P.2d 94 \(1936\).](#)

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[\[FN3\] Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 \(1976\); Blackburn v. Brorein, 70 So. 2d 293 \(Fla. 1954\); Oklahoma City v. Century Indem. Co., 1936 OK 589, 178 Okla. 212, 62 P.2d 94 \(1936\).](#)

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[\[FN4\] § 229.](#)

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[\[FN5\] Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 \(1976\).](#)

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## § 41. De facto deputies

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 48

One may be a de facto deputy[\[FN1\]](#) for failure to qualify, as by failing to take the qualifying oath and oath of office, without invalidating his or her official acts as to third persons.[\[FN2\]](#)

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[\[FN1\] Malone v. State, 406 So. 2d 1060 \(Ala. Crim. App. 1981\), writ denied, 406 So. 2d 1066 \(Ala. 1981\); Carty v. State, 421 N.E.2d 1151 \(Ind. Ct. App. 1981\); Wheeler v. Exline, 150 W. Va. 481, 147 S.E.2d 404 \(1966\).](#)



- As to de facto officers, generally, see [§§ 23 et seq.](#)

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[FN2] [Malone v. State, 406 So. 2d 1060 \(Ala. Crim. App. 1981\)](#), writ denied, [406 So. 2d 1066 \(Ala. 1981\)](#).

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## II. Creation of Public Office

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### § 42. Generally

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 2, 3

Public offices are created to meet the needs of the people,[[FN1](#)] and a sovereign government has within its own jurisdiction the right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration.[[FN2](#)] A public office, however, cannot exist without authority of law.[[FN3](#)]

A public office may be created by statute[[FN4](#)] or constitution.[[FN5](#)] It is not necessary that the legislature or other creating body declare in express words that the office is created, the use of any language which shows the legislative intent being sufficient.[[FN6](#)] The mere appropriation by the legislature or general assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office.[[FN7](#)]

Where offices are created, the appointing body cannot by mere appointment of incumbents expand or reduce the number of such offices at its discretion.[[FN8](#)]

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[[FN1](#)] [State ex rel. Hall v. Vaughn, 483 S.W.2d 396 \(Mo. 1972\).](#)

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[[FN2](#)] [Higginbotham v. City of Baton Rouge, La., 306 U.S. 535, 59 S. Ct. 705, 83 L. Ed. 968 \(1939\).](#)

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[[FN3](#)] [State ex rel. Musick v. Londeree, 145 W. Va. 369, 115 S.E.2d 96 \(1960\).](#)

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[[FN4](#)] [§ 43.](#)

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[[FN5](#)] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\).](#)

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[FN6] [Lancaster Independent School Dist. v. Pinson](#), 510 S.W.2d 380 (Tex. Civ. App. Dallas 1974), writ refused n.r.e., (Oct. 30, 1974).

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[FN7] [Handlon v. Town of Belleville](#), 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

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[FN8] [Holcombe v. Grotz](#), 129 Tex. 100, 102 S.W.2d 1041, 110 A.L.R. 234 (1937); [State ex rel. Musick v. Londeree](#), 145 W. Va. 369, 115 S.E.2d 96 (1960).

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## II. Creation of Public Office

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### § 43. Power of legislature

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [2](#), [3](#)

A public office may be created by statute,[FN1] and the creation of public offices is primarily a legislative function.[FN2] In so far as the legislative power in this respect is not restricted by constitutional provisions, it is supreme.[FN3] The legislative power of the state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach.[FN4] When in the exigencies of government it is necessary to create and define new duties, the legislative department has the discretion to determine whether additional offices will be created, or whether these duties are to be attached to and become ex officio duties of existing offices.[FN5]

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[FN1] [Holmgren v. North Dakota Workers Compensation Bureau](#), 455 N.W.2d 200 (N.D. 1990).

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[FN2] [Cochnower v. U.S.](#), 248 U.S. 405, 39 S. Ct. 137, 63 L. Ed. 328 (1919), judgment modified on other grounds, [249 U.S. 588](#), 39 S. Ct. 387, 63 L. Ed. 790 (1919); [Leek v. Theis](#), 217 Kan. 784, 539 P.2d 304 (1975); [Reilly v. Ozzard](#), 33 N.J. 529, 166 A.2d 360, 89 A.L.R.2d 612 (1960).

- The legislature has the unquestioned right to create offices in the public interest. [Proksa v. Arizona State Schools for the Deaf and the Blind](#), 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003).

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[FN3] [Higginbotham v. City of Baton Rouge, La.](#), 306 U.S. 535, 59 S. Ct. 705, 83 L. Ed. 968 (1939); [Dykeman v. Symonds](#), 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976).

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[FN4] [Dupont v. Kember](#), 501 F. Supp. 1081 (M.D. La. 1980).

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[FN5] [Neeman v. Nebraska Natural Resources Commission](#), 191 Neb. 672, 217 N.W.2d 166 (1974).

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[Determination as to good faith in abolition of public office or employment subject to civil service or merit system, 87 A.L.R.3d 1165](#)

A legislature or governing body may abolish a public office,[\[FN1\]](#) since the power to create an office[\[FN2\]](#) generally includes the power to modify or abolish such office.[\[FN3\]](#) Where the office is of legislative creation, the legislature may, unless prohibited by the constitution, control, modify, or abolish it whenever such course may seem necessary, expedient, or conducive to the public good,[\[FN4\]](#) or whenever such action may seem fit.[\[FN5\]](#)

There is no obligation or necessity to continue a useless office,[FN6] and a position may be abolished for purposes of economy or efficiency.[FN7] The determination that a position should be abolished for reasons of efficiency and economy is solely within the judgment and discretion of the governing authority in whom the power to eliminate the office is vested.[FN8]

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[FN1] Lyons v. City of Pittsburgh, 137 Pa. Commw. 330, 586 A.2d 469 (1991).

- The legislature has the unquestioned right to abolish offices in the public interest. Proksa v. Arizona State Schools for the Deaf and the Blind, 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003).

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[FN2] As to the creation of public offices, generally, see § 42.

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[FN3] Dianis v. Waenke, 29 Ill. App. 3d 133, 330 N.E.2d 302 (2d Dist. 1975); State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. 1972); Ball v. State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323 (1977).

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[FN4] Higginbotham v. City of Baton Rouge, La., 306 U.S. 535, 59 S. Ct. 705, 83 L. Ed. 968 (1939); Dupont v. Kember, 501 F. Supp. 1081 (M.D. La. 1980); Corn v. City of Oakland City, 415 N.E.2d 129 (Ind. Ct. App. 1981); Payne v. Davis, 254 S.W.2d 710 (Ky. 1953); Power v. Secretary of Dept. of Community Affairs, 7 Mass. App. Ct. 409, 388 N.E.2d 304 (1979); Shamberger v. Ferrari, 73 Nev. 201, 314 P.2d 384 (1957); Ball v. State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323 (1977).

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[FN5] New Castle County Council v. State, 698 A.2d 401 (Del. Super. Ct. 1996), judgment aff'd, 692 A.2d 414 (Del. 1996), opinion issued, 688 A.2d 888 (Del. 1996).

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[FN6] State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. 1972).

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[FN7] Mucci v. City of Binghamton, 245 A.D.2d 678, 664 N.Y.S.2d 396 (3d Dep't 1997).

- The merit principle ordinarily allows state agencies broad discretion to eliminate positions for reasons of efficiency and economy, provided that their decisions are not politically motivated. Moore v. State, Dept. of Transp. and Public Facilities, 875 P.2d 765 (Alaska 1994).

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[FN8] Mandel v. Allen, 81 F.3d 478 (4th Cir. 1996); Fusaro v. Civil Service Commission of City of Pittsburgh, 16 Pa. Commw. 1, 328 A.2d 916 (1974).

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**§ 45. Constitutional offices**

**West's Key Number Digest**

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Constitutional offices may be modified or abolished by the people through a constitutional provision.[FN1] A constitutional office may not be abolished without constitutional authorization,[FN2] and such offices are beyond the power of the legislature to alter or discontinue.[FN3] The mere mention of an office in the constitution, however, does not necessarily endow that office with constitutional status, which prevents its abolition by the legislature.[FN4]

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[FN1] [Morris v. Gonzales](#), 91 N.M. 495, 576 P.2d 755 (1978).

- As to constitutional offices, generally, see [§ 15](#).

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[FN2] [Moncrief v. Gurley](#), 609 S.W.2d 863 (Tex. Civ. App. Fort Worth 1980), writ refused n.r.e., (Mar. 18, 1981).

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[FN3] [Corn v. City of Oakland City](#), 415 N.E.2d 129 (Ind. Ct. App. 1981); [Murphy v. Yates](#), 276 Md. 475, 348 A.2d 837, 84 A.L.R.3d 1 (1975).

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[FN4] [Opinions of the Justices to the Senate](#), 372 Mass. 883, 363 N.E.2d 652 (1977); [State ex rel. Harvey v. Second Judicial Dist. Court](#), 117 Nev. 754, 32 P.3d 1263 (2001).

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**§ 46. Manner of abolition**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 4

If an office is created by statute or ordinance, it can be abolished only by statute or ordinance, and not by resolution.<sup>[FN1]</sup> When a position is created or a term of office fixed by a legislative act, the budgetary authority has no power to abolish the position or shorten the term by refusing to appropriate the funds necessary to meet payroll requirements.<sup>[FN2]</sup>

The repeal of a law creating an office abolishes that office, and thus an office is abolished when the act creating it is repealed.<sup>[FN3]</sup> Yet the repeal of a statute creating an office, accompanied by the re-enactment of the substance of such statute, does not abolish the office.<sup>[FN4]</sup>

Abolition of an office may also be brought about by a constitutional provision<sup>[FN5]</sup> or by a new constitution or a constitutional amendment.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Joyce v. Ortiz](#), 108 A.D.2d 158, 487 N.Y.S.2d 746 (1st Dep't 1985).

- Under the doctrine of legislative equivalency, a position created by a legislative act can only be abolished by a correlative legislative act. [Lamb v. Town of Esopus](#), 35 A.D.3d 1004, 827 N.Y.S.2d 307 (3d Dep't 2006).

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<sup>[FN2]</sup> [Blyn v. Bartlett](#), 50 A.D.2d 442, 379 N.Y.S.2d 616 (3d Dep't 1976), order aff'd, 39 N.Y.2d 349, 384 N.Y.S.2d 99, 348 N.E.2d 555 (1976).

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<sup>[FN3]</sup> [Lewis v. U.S.](#), 244 U.S. 134, 37 S. Ct. 570, 61 L. Ed. 1039 (1917); [Brame v. U.S.](#), 10 Cl. Ct. 252 (1986), decision aff'd without opinion, 818 F.2d 876 (Fed. Cir. 1987); [Carter v. Burson](#), 230 Ga. 511, 198 S.E.2d 151 (1973); [Caldwell v. Lyon](#), 168 Tenn. 607, 80 S.W.2d 80, 100 A.L.R. 1152 (1935).

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<sup>[FN4]</sup> [King v. Uhlmann](#), 103 Ariz. 136, 437 P.2d 928 (1968).

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<sup>[FN5]</sup> [Luckett v. Madison County](#), 137 Miss. 1, 101 So. 851, 37 A.L.R. 814 (1924).

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<sup>[FN6]</sup> [State ex rel. O'Connell v. Duncan](#), 108 Mont. 141, 88 P.2d 73 (1939).

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#### § 47. Effect of abolition on incumbent; incumbent's rights

##### West's Key Number Digest

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A legislature may abolish any office it creates without infringing upon the rights of the officer affected.<sup>[FN1]</sup> Absent any express constitutional limitation, a legislative body has full and unquestionable power to abolish an office of its creation or to modify the terms of the office, in the public interest, even though the effect may be to curtail an incumbent's unexpired term.<sup>[FN2]</sup> Thus, absent some constitutional prohibition, an office created by the legislature may be abolished by the legislature during the term of an incumbent,<sup>[FN3]</sup> and the office holder may be ousted prior to the completion of his or her term.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Comer v. City of Mobile, 337 So. 2d 742 \(Ala. 1976\).](#)

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<sup>[FN2]</sup> [Michaelis v. City of Long Beach, 46 A.D.2d 772, 360 N.Y.S.2d 473 \(2d Dep't 1974\).](#)

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<sup>[FN3]</sup> [Corn v. City of Oakland City, 415 N.E.2d 129 \(Ind. Ct. App. 1981\).](#)

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<sup>[FN4]</sup> [Lyons v. City of Pittsburgh, 137 Pa. Commw. 330, 586 A.2d 469 \(1991\).](#)

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## IV. Eligibility and Qualifications for Public Office or Employment

### A. In General

#### 1. Nature and Basis of Eligibility and Qualifications

[Topic Summary](#) [Correlation Table](#) [References](#)

### § 48. Generally

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 18, 35

To hold a public office, one must be eligible and possess the qualifications prescribed by law.[FN1] The government may not condition public employment upon the surrender of constitutional rights which cannot be abridged by direct government action.[FN2] Nor may the government arbitrarily deprive an employee of constitutional rights as a condition of public employment,[FN3] or bar him or her from public employment arbitrarily or in disregard of his or her constitutional rights.[FN4] Thus, the government may not require an individual to relinquish rights guaranteed by the First Amendment as a condition of public employment,[FN5] and inquiries into personal beliefs and associational choices come within this protection.[FN6]

In general, a public office should be conferred solely upon considerations of ability, integrity, fidelity, and fitness for the position,[FN7] and a person cannot be denied government employment because of factors totally unconnected with the responsibilities of such employment.[FN8] There is, however, no constitutional provision which bars the imposition of reasonable and necessary limitations and conditions on government employment,[FN9] so that a governmental agency may place reasonable conditions on public employment.[FN10]

The exercise of the right to hold public office, where recognized as a right,[FN11] may not be prohibited or curtailed except by plain provisions of the law.[FN12] Furthermore, no one should be denied the right to be a candidate for public office unless the constitution or applicable valid law expressly declares the candidate ineligible.[FN13]

Negatively phrased qualifications for specific offices imply that those qualifications are exclusive.[FN14]

**Observation:** A critical distinction exists between a "qualification" for office and an "eligibility requirement" for office. A qualification is an element of performance requiring a particular ability on the part of the person seeking the position, such as physical agility or the attainment of a particular level of education. Eligibility requirements, on the other hand, have nothing to do with one's ability to perform the duties of the office in question, and include such matters as age and residency requirements. A term limit also is an eligibility requirement because it has nothing to do with the particular person's ability to perform the job.[FN15]

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[FN1] [McGee v. Borom](#), 341 So. 2d 141 (Ala. 1976).

- As to technical prerequisites and qualifications prior to taking office, after election or appointment, see [§§ 121 et seq.](#)

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[FN2] [Keyishian v. Board of Regents of University of State of N. Y.](#), 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); [National Ed. Ass'n, Inc. v. Lee County Bd. of Public Instruction](#), 467 F.2d 447 (5th Cir. 1972); [Thomasson v. Modlinski](#), 876 F. Supp. 818 (E.D. Va. 1995), judgment aff'd without opinion, 76 F.3d 375 (4th Cir. 1996); [Lindsey v. State ex rel. Dept. of Corrections](#), 1979 OK 35, 593 P.2d 1088 (Okla. 1979).

- The requirement that a public employee authorize the release of a broad range of confidential financial information, as a condition of employment, infringed the employee's right of privacy in confidential information, under the due process clause, where the employer provided no basis for requiring the information and no safeguards against misuse or further disclosure. [Denius v. Dunlap](#), 209 F.3d 944, 143 Ed. Law Rep. 736

[\(7th Cir. 2000\).](#)

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[FN3] [Valenzuela v. Board of Civil Service Comrs.](#), 40 Cal. App. 3d 557, 115 Cal. Rptr. 103 (2d Dist. 1974).

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[FN4] [California School Employees Assn. v. Foothill Community College Dist.](#), 52 Cal. App. 3d 150, 124 Cal. Rptr. 830 (1st Dist. 1975) (disapproved of on other grounds by, [Cranston v. City of Richmond](#), 40 Cal. 3d 755, 221 Cal. Rptr. 779, 710 P.2d 845 (1985)).

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[FN5] [Abood v. Detroit Bd. of Ed.](#), 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977); [Robinson v. Reed](#), 566 F.2d 911 (5th Cir. 1978).

- A state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. [Garcetti v. Ceballos](#), 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

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[FN6] [Baird v. State Bar of Ariz.](#), 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971); [Robinson v. Reed](#), 566 F.2d 911 (5th Cir. 1978).

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[FN7] [Hall v. Pierce](#), 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957).

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[FN8] [Hetherington v. State Personnel Bd.](#), 82 Cal. App. 3d 582, 147 Cal. Rptr. 300 (3d Dist. 1978).

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[FN9] [Cacace v. Seniuk](#), 104 Misc. 2d 560, 428 N.Y.S.2d 819 (Sup 1980).

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[FN10] [Division 241 Amalgamated Transit Union \(AFL-CIO\) v. Suscy](#), 538 F.2d 1264 (7th Cir. 1976).

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[FN11] [§ 12](#).

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[FN12] [McGuire v. Nogaj](#), 146 Ill. App. 3d 280, 99 Ill. Dec. 945, 496 N.E.2d 1037 (1st Dist. 1986); [State v. Musto](#), 187 N.J. Super. 264, 454 A.2d 449 (Law Div. 1982), opinion aff'd, 188 N.J. Super. 106, 456 A.2d 114 (App. Div. 1983).

- The right of a citizen to hold office is the general rule, ineligibility the exception, and therefore a citizen may not be deprived of this right without proof of some disqualification specifically declared by law. [Jarnagin v. Harris](#), 138 Ga. App. 318, 226 S.E.2d 108 (1976).

- As to construction of restrictions on eligibility to hold public office, generally, see [§ 53](#).

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[FN13] [McGee v. Borom](#), 341 So. 2d 141 (Ala. 1976); [Vieira v. Slaughter](#), 318 So. 2d 490 (Fla. Dist. Ct. App. 1st Dist. 1975).

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[FN14] [Reale v. Board of Real Estate Appraisers](#), 880 P.2d 1205 (Colo. 1994).

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[FN15] [Minneapolis Term Limits Coalition v. Keefe](#), 535 N.W.2d 306 (Minn. 1995).

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#### IV. Eligibility and Qualifications for Public Office or Employment

##### A. In General

##### 2. Power to Prescribe Qualifications

[Topic Summary](#) [Correlation Table](#) [References](#)

### § 49. State's power to prescribe qualifications

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 19

Each state has the power to prescribe the manner in which its officers are to be chosen.[FN1] Qualifications for office are often set forth by state constitutional provisions,[FN2] and state constitutions may impose those disqualifications which may be validly imposed upon constitutionally authorized public offices.[FN3] The determination of who is eligible to be a public officer is an exercise of the state's police power,[FN4] and it is essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.[FN5] Thus, a state has the right to set qualifications for public office so long as it is done in accord with the United States Constitution, and the state's own constitution.[FN6]

**Observation:** The right to vote and the right to be a candidate for and to hold office are separate matters, and the state may require that a citizen meet stricter requirements to hold office than he or she does to vote for those offices.[FN7]

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[FN1] [Gregory v. Ashcroft](#), 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); [Greenwood v. Singel](#), 823 F. Supp. 1207 (E.D. Pa. 1993).

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[FN2] [Minneapolis Term Limits Coalition v. Keefe](#), 535 N.W.2d 306 (Minn. 1995); [Baker v. Martin](#), 330 N.C. 331, 410 S.E.2d 887 (1991).

- As to eligibility and qualifications of candidates for election to public office, generally, see [Am. Jur. 2d, Elections §§ 246 et seq.](#)

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[\[FN3\] Cook v. City of Jacksonville, 823 So. 2d 86, 112 A.L.R.5th 701 \(Fla. 2002\).](#)

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[\[FN4\] State, Law Enforcement Standards Bd. v. Village of Lyndon Station, 98 Wis. 2d 229, 295 N.W.2d 818 \(Ct. App. 1980\), judgment aff'd, 101 Wis. 2d 472, 305 N.W.2d 89 \(1981\).](#)

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[\[FN5\] Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 \(1991\).](#)

- A state's right to impose restrictions on one seeking public office is a power reserved to the states under the Tenth Amendment of the Federal Constitution. [Chimento v. Stark, 353 F. Supp. 1211 \(D.N.H. 1973\)](#), judgment aff'd, [414 U.S. 802, 94 S. Ct. 125, 38 L. Ed. 2d 39 \(1973\)](#).

- The privilege of holding public employment or office may not be denied by a state on the basis of distinctions which violate federal constitutional guarantees. [Rhode Island Minority Caucus, Inc. v. Baronian, 590 F.2d 372 \(1st Cir. 1979\)](#).

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[\[FN6\] Spencer v. Board of Ed. of City of Schenectady, 69 Misc. 2d 1091, 333 N.Y.S.2d 308 \(Sup 1972\).](#)

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[\[FN7\] Triano v. Massion, 109 Ariz. 506, 513 P.2d 935 \(1973\).](#)

- As to voting rights, generally, see [Am. Jur. 2d, Elections §§ 100 et seq.](#)

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IV. Eligibility and Qualifications for Public Office or Employment

A. In General

2. Power to Prescribe Qualifications

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 50. Power of legislature to prescribe qualifications**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [19](#)

The legislature is generally empowered, sometimes by express authorization of the constitution, to prescribe the qualifications for holding public office, or particular offices,[FN1] provided it does not thereby exceed its constitutional powers or impose conditions of eligibility inconsistent with constitutional provisions.[FN2] Thus, a state legislature generally may prescribe qualifications for office,[FN3] so long as the limitations do not offend the federal or state constitutions,[FN4] or any express provision thereof,[FN5] and so long as such limitations are not unreasonable,[FN6] arbitrary,[FN7] or capricious.[FN8] Legislatively imposed qualifications for office may, for instance, relate to one's age, integrity, training, or residence.[FN9]

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[FN1] Rogers v. Medical Ass'n of Georgia, 244 Ga. 151, 259 S.E.2d 85 (1979); State ex rel. Buttz v. Marion Circuit Court, 225 Ind. 7, 72 N.E.2d 225, 170 A.L.R. 187 (1947); Paey v. Rodrigue, 119 N.H. 186, 400 A.2d 51 (1979); Dykeman v. Symonds, 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976); State ex rel. Watson v. Hamilton Cty. Bd. of Elections, 88 Ohio St. 3d 239, 2000-Ohio-318, 725 N.E.2d 255 (2000); Coyne v. State ex rel. Thomas, 595 P.2d 970 (Wyo. 1979).

- The legislature decides who may qualify for public office. Unified School Dist. No. 501, Shawnee County, Kan. v. Baker, 269 Kan. 239, 6 P.3d 848, 146 Ed. Law Rep. 902 (2000).

[FN2] Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966); Matter of Massey, 227 Kan. 155, 605 P.2d 147 (1980).

- The legislature may, within constitutional limitations, establish qualifications for public office. Hardin v. Brookins, 275 Ga. 477, 569 S.E.2d 511 (2002).

- The constitutional provision making a person ineligible to hold any office, if that person is not a registered voter, has been convicted of a felony involving moral turpitude, or is illegally holding public funds, does not limit the legislature from establishing other qualifications for office. Haynes v. Wells, 273 Ga. 106, 538 S.E.2d 430 (2000).

[FN3] McCullough v. State ex rel. Burrell, 352 So. 2d 1121 (Ala. 1977); Daniels v. Tergeson, 211 Cal. App. 3d 1204, 259 Cal. Rptr. 879 (5th Dist. 1989).

[FN4] McCullough v. State ex rel. Burrell, 352 So. 2d 1121 (Ala. 1977).

[FN5] Nathan v. Smith, 230 Ga. 612, 198 S.E.2d 509 (1973).

[FN6] McCullough v. State ex rel. Burrell, 352 So. 2d 1121 (Ala. 1977).

[FN7] Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120 (1967).

- The legislature cannot enact arbitrary exclusions from office. Daniels v. Tergeson, 211 Cal. App. 3d 1204, 259 Cal. Rptr. 879 (5th Dist. 1989).

[FN8] Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120 (1967).

[FN9] Daniels v. Tergeson, 211 Cal. App. 3d 1204, 259 Cal. Rptr. 879 (5th Dist. 1989); Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120 (1967).

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IV. Eligibility and Qualifications for Public Office or Employment

A. In General

2. Power to Prescribe Qualifications

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**§ 51. Power of legislature to prescribe qualifications—Effect of constitutional provisions regarding qualifications; constitutional offices**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [19](#)

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[Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155](#) (sec. 60 superseded in part [Validity of age requirement for state public office, 90 A.L.R.3d 900](#))

Generally, if a state constitution establishes specific eligibility requirements or prescribes qualifications for holding a particular constitutional office, the constitutional criteria are exclusive.[FN1] The legislature has no power to add to the qualifications,[FN2] or to require different qualifications, for a constitutional office,[FN3] unless the constitution, expressly or impliedly, gives the legislature the power to do so.[FN4] Thus, where specific qualifications for an office are listed in both the state constitution and a statute, the constitution controls and voids the statute.[FN5]

The fact that a constitution, while silent as to any specific qualifications for a particular constitutional office, prescribed qualifications or disqualifications for eligibility to office, generally, and some specific qualifications for certain other constitutional offices, has been interpreted as meaning that the omission of specific qualifications for the particular office was deliberate, and done with the intention that as to such office, only the general eligibility requirements of the constitution were to be imposed, the result being that the legislature was powerless to prescribe additional qualifications for eligibility to such constitutional office.[FN6] On the other hand, there is authority that where the constitution creates an office, but does not prescribe any specific qualifications for eligibility to it, the legislature has the power to prescribe qualifications for such constitutional



office, at least where such qualifications are reasonable and do not conflict with those prescribed by the constitution for office holding generally.[FN7]

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[FN1] Labor's Educational and Political Club-Independent v. Danforth, 561 S.W.2d 339 (Mo. 1977); Oklahoma State Election Bd. v. Coats, 1980 OK 65, 610 P.2d 776 (Okla. 1980); Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

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[FN2] Daniels v. Dennis, 365 Ark. 338, 229 S.W.3d 880 (2006); Opinion of the Justices, 290 A.2d 645 (Del. 1972); Anagnost v. Layhe, 230 Ill. App. 3d 540, 172 Ill. Dec. 46, 595 N.E.2d 109 (1st Dist. 1992).

- The legislature is prohibited from adding to the disqualifications of a constitutional office, where the limitations are specifically expressed in the constitution. Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d 134 (Fla. 2008).

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[FN3] Opinion of the Justices, 291 Ala. 581, 285 So. 2d 87 (1973); Petition of Justice of the Peace Ass'n of Ind., 237 Ind. 436, 147 N.E.2d 16 (1958); Starbuck v. Town of Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960).

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[FN4] Labor's Educational and Political Club-Independent v. Danforth, 561 S.W.2d 339 (Mo. 1977); Oklahoma State Election Bd. v. Coats, 1980 OK 65, 610 P.2d 776 (Okla. 1980).

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[FN5] Daniels v. Dennis, 365 Ark. 338, 229 S.W.3d 880 (2006).

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[FN6] Thomas v. State ex rel. Cobb, 58 So. 2d 173, 34 A.L.R.2d 140 (Fla. 1952).

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[FN7] Welch v. Key, 1961 OK 201, 365 P.2d 154 (Okla. 1961); State v. Betensen, 14 Utah 2d 121, 378 P.2d 669 (1963); In re Bartz, 47 Wash. 2d 161, 287 P.2d 119 (1955).

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IV. Eligibility and Qualifications for Public Office or Employment

## A. In General

### 3. Qualifications Based on Classification; Standards of Review; Presumptions; Construction

[Topic Summary](#) [Correlation Table](#) [References](#)

#### § 52. Qualifications based on classification of individuals; standards of review

##### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 18, 35

There is a federal constitutional right to be considered for public office without the burden of invidiously discriminatory disqualifications.[FN1] Some authority holds that the right to be considered for public employment without invidious discrimination or unreasonable limitation is a fundamental right, requiring application of the strict scrutiny test, and a demonstration of a compelling state interest in the classification made, as well as a demonstration that a no less intrusive means could achieve the same result.[FN2] Thus, if a state's exercise of its right to impose restrictions on one seeking public office invades an individual's constitutional rights, the restrictions become unconstitutional unless there is a showing of a compelling state interest justifying them.[FN3] Other authority, however, holds that the right to run for public office, and candidacy for public office, are not fundamental rights[FN4] protected by the 14th Amendment, and that legislative restrictions upon such rights need not necessarily invoke strict scrutiny for purposes of equal protection claims.[FN5]

Where strict scrutiny has not been applied, and an office has been created by a legislative enactment, the legislature has the power to specify that certain classes of individuals are disqualified from holding the office, so long as the disqualification has a reasonable relationship to a legitimate state interest.[FN6] In this regard, if a classification is employed in setting qualifications for public office, it must be nondiscriminatory,[FN7] and be based on a real and substantial difference having a reasonable relation to a legitimate object of government.[FN8] As otherwise stated, qualifications for office must have a rational basis,[FN9] that is, there must be a rational nexus between any requirements and the duties of the position in question,[FN10] and such qualifications must relate to the needs of office.[FN11] Thus, the legislature may prescribe qualifications which reasonably relate to the needs of office-holding or to the specialized demands of an office,[FN12] whether that office is elective[FN13] or appointive.[FN14] Under this standard, a classification does not deny equal protection simply because in practice it results in some inequality. Practical problems of government permit rough accommodations, and the classification will be upheld if any stated facts reasonably can be conceived to justify it.[FN15]

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[FN1] [Meyers v. Roberts](#), 310 Minn. 358, 246 N.W.2d 186, 90 A.L.R.3d 893 (1976).

- The equal protection clause guarantees a right to be considered for public office without the burden of invidiously discriminatory disqualifications. [Antonio v. Kirkpatrick](#), 453 F. Supp. 1161 (W.D. Mo. 1978), judgment aff'd, 579 F.2d 1147 (8th Cir. 1978).

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[FN2] [Cooperrider v. Civil Service Com.](#), 97 Cal. App. 3d 495, 158 Cal. Rptr. 801 (1st Dist. 1979).

- The right to become a candidate for public office is a fundamental right, and any restriction on the exercise of this right must serve a compelling state interest. [Deeds v. Lindsey](#), 179 W. Va. 674, 371 S.E.2d 602 (1988).

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[FN3] [Chimento v. Stark](#), 353 F. Supp. 1211 (D.N.H. 1973), judgment aff'd, 414 U.S. 802, 94 S. Ct. 125, 38 L. Ed. 2d 39 (1973).

- Since running for and holding political office are forms of political expression, there must exist a compelling state interest in order to uphold the validity of a restriction on holding political office. [Com. ex rel. Toole v.](#)

[Yanoshak, 464 Pa. 239, 346 A.2d 304 \(1975\).](#)

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[FN4] [As to the right to public office or employment, or to be considered for such, generally, see § 12.](#)

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[FN5] [Butts v. Nichols, 381 F. Supp. 573 \(S.D. Iowa 1974\); Clough v. Guzzi, 416 F. Supp. 1057 \(D. Mass. 1976\); Johnson v. Hamilton, 15 Cal. 3d 461, 125 Cal. Rptr. 129, 541 P.2d 881 \(1975\).](#)

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[FN6] [People ex rel. Ryan v. Coles, 64 Ill. App. 3d 807, 21 Ill. Dec. 543, 381 N.E.2d 990 \(2d Dist. 1978\).](#)

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[FN7] [Daniels v. Tergeson, 211 Cal. App. 3d 1204, 259 Cal. Rptr. 879 \(5th Dist. 1989\).](#)

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[FN8] [Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 \(1956\); Redmond v. Carter, 247 N.W.2d 268 \(Iowa 1976\).](#)

- A state pre-employment residence requirement, which limited applications for public employment to current legal residents of the state at the time of application, was not rationally related to any legitimate interest or goal of the state, and thus violated the fundamental right of out-of-state persons to interstate migration. [Walsh v. City and County of Honolulu, 460 F. Supp. 2d 1207 \(D. Haw. 2006\).](#)

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[FN9] [Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120 \(1967\).](#)

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[FN10] [Osterman v. Paulk, 387 F. Supp. 669 \(S.D. Fla. 1974\).](#)

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[FN11] [Daniels v. Tergeson, 211 Cal. App. 3d 1204, 259 Cal. Rptr. 879 \(5th Dist. 1989\).](#)

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[FN12] [Humane Soc. of U. S., New Jersey Branch, Inc. v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 \(1976\).](#)

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[FN13] [Fair Housing Council, Inc. v. New Jersey Real Estate Commission, 141 N.J. Super. 334, 358 A.2d 221 \(App. Div. 1976\).](#)

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[FN14] [Fair Housing Council, Inc. v. New Jersey Real Estate Commission, 141 N.J. Super. 334, 358 A.2d 221 \(App. Div. 1976\).](#)

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[FN15] [Redmond v. Carter, 247 N.W.2d 268 \(Iowa 1976\).](#)

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IV. Eligibility and Qualifications for Public Office or Employment

A. In General

3. Qualifications Based on Classification; Standards of Review; Presumptions; Construction

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 53. Presumption in favor of eligibility; construction of eligibility restrictions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [18](#), [19](#), [35](#)

There is a presumption in favor of eligibility of one who has been chosen<sup>[FN1]</sup> and elected,<sup>[FN2]</sup> or appointed,<sup>[FN3]</sup> to public office, and a strong public policy exists in favor of eligibility for public office.<sup>[FN4]</sup> Thus, the imposition of restrictions upon the right of a person to hold a public office should receive a liberal construction in favor of the people exercising freedom of choice in the selection of their public officers,<sup>[FN5]</sup> and statutes declaring qualifications are to receive a liberal construction.<sup>[FN6]</sup> As otherwise stated, the right to public office,<sup>[FN7]</sup> or any constitutional or statutory provision which restricts the right to hold office,<sup>[FN8]</sup> must be strictly construed against ineligibility, and statutory and constitutional provisions which tend to limit the candidacy of any person for public office must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby.<sup>[FN9]</sup> If there is any doubt<sup>[FN10]</sup> or ambiguity<sup>[FN11]</sup> in the applicable provisions, such doubt or ambiguity must be resolved in favor of eligibility. Thus, a constitutional provision, where the language and context allow, should be construed so as to preserve eligibility.<sup>[FN12]</sup>

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<sup>[FN1]</sup> [Cannon v. Gardner, 611 P.2d 1207 \(Utah 1980\).](#)

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<sup>[FN2]</sup> [Shirley v. Superior Court In and For Apache County, 109 Ariz. 510, 513 P.2d 939 \(1973\); Cannon v. Gardner, 611 P.2d 1207 \(Utah 1980\).](#)

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<sup>[FN3]</sup> [Shirley v. Superior Court In and For Apache County, 109 Ariz. 510, 513 P.2d 939 \(1973\).](#)

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<sup>[FN4]</sup> [State ex rel. Bickford v. Jacobson, 16 Wash. App. 473, 558 P.2d 292 \(Div. 2 1976\); State ex rel. Rist v. Underwood, 206 W. Va. 258, 524 S.E.2d 179 \(1999\).](#)

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<sup>[FN5]</sup> [Vieira v. Slaughter, 318 So. 2d 490 \(Fla. Dist. Ct. App. 1st Dist. 1975\).](#)

- Statutes limiting the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office so that the public may have the benefit of choice from all those who are in fact and in law qualified. [Hardin v. Brookins, 275 Ga. 477, 569 S.E.2d 511 \(2002\); State ex rel. O'Donnell v. Cuyahoga Cty.](#)

[Bd. of Elections, 136 Ohio App. 3d 584, 737 N.E.2d 541 \(8th Dist. Cuyahoga County 2000\).](#)

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[\[FN6\] Shirley v. Superior Court In and For Apache County, 109 Ariz. 510, 513 P.2d 939 \(1973\); Ervin v. Collins, 85 So. 2d 852, 59 A.L.R.2d 706 \(Fla. 1956\); Gilbert v. Breithaupt, 60 Nev. 162, 104 P.2d 183, 128 A.L.R. 1111 \(1940\).](#)

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[\[FN7\] Stockburger v. Ray, 488 S.W.2d 378 \(Tenn. Ct. App. 1972\); State v. Millsap, 605 S.W.2d 366 \(Tex. Civ. App. Beaumont 1980\).](#)

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[\[FN8\] In re Carlisle, 209 S.W.3d 93 \(Tex. 2006\).](#)

- Any restrictions on the exercise of the fundamental right to hold public office must be strictly construed. [People v. Ballard, 104 Cal. App. 3d 757, 164 Cal. Rptr. 81 \(4th Dist. 1980\).](#)

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[\[FN9\] Brimmer v. Thomson, 521 P.2d 574 \(Wyo. 1974\).](#)

- Courts must strictly construe any pertinent legal provision that restricts the right to hold office in favor of eligibility. [In re Jackson, 14 S.W.3d 843 \(Tex. App. Waco 2000\).](#)

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[\[FN10\] Vieira v. Slaughter, 318 So. 2d 490 \(Fla. Dist. Ct. App. 1st Dist. 1975\); Cannon v. Gardner, 611 P.2d 1207 \(Utah 1980\).](#)

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[\[FN11\] Woo v. Superior Court, 83 Cal. App. 4th 967, 100 Cal. Rptr. 2d 156 \(2d Dist. 2000\); Vieira v. Slaughter, 318 So. 2d 490 \(Fla. Dist. Ct. App. 1st Dist. 1975\).](#)

- If there is a statutory ambiguity as to whether a candidate is eligible to run for office, the statute should be construed in favor of eligibility, so long as it may be reasonably so read. [Municipality Of Anchorage v. Mjos, 179 P.3d 941 \(Alaska 2008\).](#)

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[\[FN12\] State ex rel. Bickford v. Jacobson, 16 Wash. App. 473, 558 P.2d 292 \(Div. 2 1976\).](#)

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IV. Eligibility and Qualifications for Public Office or Employment

4. Time as to Which Eligibility Requirements Must be Met or Determined

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 54. Generally

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 18, 19, 32 to 35

In determining when the conditions of eligibility for a public office must exist, the language used in a constitutional or statutory provision declaring the qualifications is to be considered.[FN1] The language of the pertinent statute or constitutional provision relating to essential qualifications of candidates for a public office must be regarded by a court as controlling in determining at what time an essential qualification must exist.[FN2] Constitutional or statutory provisions may expressly or by necessary implication specify the time when the required eligibility must exist, and where this is the case, there can be no question but that the candidate must possess the necessary qualifications at that time.[FN3]

If it is specified that the qualifications must exist at the time of the election, a candidate who does not possess them at that time is not eligible although the disqualifications cease to exist before the beginning of the term.[FN4] Some authority holds, however, that a person who is elected to office can remove his or her ineligibility before the term of office begins.[FN5]

Some states follow the rule that eligibility to hold public office is generally to be determined by the statutory and constitutional requirements in effect on the date of the election.[FN6]

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[FN1] [Murray v. Murray](#), 7 N.J. Super. 549, 72 A.2d 421 (Law Div. 1950); [State ex rel. Dostert v. Riggleman](#), 155 W. Va. 808, 187 S.E.2d 591 (1972).

- The language used in a constitution is of primary importance in determining when the qualification to office must exist. [Cummings v. Mickelson](#), 495 N.W.2d 493 (S.D. 1993).

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[FN2] [Adkins v. Smith](#), 185 W. Va. 481, 408 S.E.2d 60, 69 Ed. Law Rep. 923 (1991).

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[FN3] [State ex rel. Flynn v. Ellis](#), 110 Mont. 43, 98 P.2d 879 (1940); [State ex rel. Dostert v. Riggleman](#), 155 W. Va. 808, 187 S.E.2d 591 (1972).

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[FN4] [Slater v. Varney](#), 136 W. Va. 406, 68 S.E.2d 757 (1951), adhered to on reh'g, 136 W. Va. 436, 70 S.E.2d 477 (1952).

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[FN5] [Shirley v. Superior Court In and For Apache County](#), 109 Ariz. 510, 513 P.2d 939 (1973).

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[FN6] [McIntyre v. Miller](#), 263 Ga. 578, 436 S.E.2d 2 (1993).

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#### IV. Eligibility and Qualifications for Public Office or Employment

##### A. In General

#### 4. Time as to Which Eligibility Requirements Must be Met or Determined

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### § 55. Absence of controlling constitutional or statutory provisions

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 18, 19, 32 to 35

If applicable constitutional or statutory provisions do not specify the time when the conditions of eligibility for public office must exist, it is necessary for the courts to have recourse to some other means of determining the matter. The terms employed in declaring the qualifications for public office are to be taken into consideration in determining the time when the conditions of eligibility must exist.<sup>[FN1]</sup> The view has sometimes been followed that the word "eligible," as used in constitutions and statutes, has reference to the capacity not of being elected to office, but of holding office, and that, therefore, if qualified at the time of commencement of the term or induction into office, disqualification of the candidate at the time of election or appointment is immaterial.<sup>[FN2]</sup> Therefore, under this view, it may suffice that a disqualification existing at the time of the election is removed before the term of office begins,<sup>[FN3]</sup> or before the candidate qualifies or is inducted into office.<sup>[FN4]</sup>

On the other hand, the view has also been followed, in the absence of a controlling statute or constitutional provision regarding the time when qualifications for office must exist, that the conditions of eligibility must exist at the time of the election, and that their existence only at the time of the commencement of the term of office or induction of the candidate into office and assumption by him or her of his or her duties is not sufficient to qualify him or her for the office.<sup>[FN5]</sup>

Where a constitutional or statutory provision refers to the "holding of" an office, rather than to "eligibility to" an office, in defining the qualifications, the qualifications are to be determined at the time of the commencement of the term or of the induction into office, rather than at the time of the election.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [State ex rel. Dostert v. Riggleman, 155 W. Va. 808, 187 S.E.2d 591 \(1972\).](#)

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<sup>[FN2]</sup> [Cox v. Starkweather, 128 Colo. 89, 260 P.2d 587 \(1953\); State ex Inf. Mitchell ex rel. Goodman v. Heath, 345 Mo. 226, 132 S.W.2d 1001 \(1939\); Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 \(1951\),](#)

adhered to on reh'g, [136 W. Va. 436, 70 S.E.2d 477 \(1952\)](#).

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[FN3] [Cox v. Starkweather, 128 Colo. 89, 260 P.2d 587 \(1953\)](#); [Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 \(1951\)](#), adhered to on reh'g, [136 W. Va. 436, 70 S.E.2d 477 \(1952\)](#).

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[FN4] [Cox v. Starkweather, 128 Colo. 89, 260 P.2d 587 \(1953\)](#); [Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 \(1951\)](#), adhered to on reh'g, [136 W. Va. 436, 70 S.E.2d 477 \(1952\)](#).

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[FN5] [Rasin v. Leaverton, 181 Md. 91, 28 A.2d 612, 143 A.L.R. 1021 \(1942\)](#); [Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 \(1951\)](#), adhered to on reh'g, [136 W. Va. 436, 70 S.E.2d 477 \(1952\)](#).

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[FN6] [Cox v. Starkweather, 128 Colo. 89, 260 P.2d 587 \(1953\)](#); [Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 \(1951\)](#), adhered to on reh'g, [136 W. Va. 436, 70 S.E.2d 477 \(1952\)](#).

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**§ 56. Disqualification arising after election and before or during term of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [18](#), [19](#), [32](#) to [35](#)

Eligibility to public office is of a continuing nature and must exist at the commencement of the term of office and during the occupancy of the office. The fact that the candidate may have been qualified at the time of



his or her election is not sufficient to entitle him or her to hold the office, if at the time of the commencement of the term or during the continuance of the incumbency he or she ceases to be qualified.[[FN1](#)]

## CUMULATIVE SUPPLEMENT

### Cases:

Eligibility to public office is of a continuing nature and must exist at the commencement of the term and during the occupancy of the office; fact that the candidate may have been qualified at the time of election is not sufficient to entitle him or her to hold the office, if during the continuance of the incumbency he or she ceases to be qualified. [State ex rel. King v. Sloan, 2011-NMSC-020, 253 P.3d 33 \(N.M. 2011\)](#).

### [END OF SUPPLEMENT]

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[[FN1](#)] [State ex rel. Gray v. Pipes, 17 La. App. 502, 133 So. 812 \(2d Cir. 1931\)](#), *aff'd*, [173 La. 488, 137 So. 862 \(1931\)](#); [State ex rel. Repay v. Fodeman, 30 Conn. Supp. 82, 300 A.2d 729 \(Super. Ct. 1972\)](#); [In re Mattera, 34 N.J. 259, 168 A.2d 38 \(1961\)](#); [State ex rel. Willis v. Larson, 539 P.2d 352 \(Wyo. 1975\)](#).

- As to technical prerequisites which must be met to assume office after election or appointment, see [§§ 121 et seq.](#)

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## West's Key Number Digest

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## Primary Authority

[U.S. Const. Art. I, § 6, cl. 2](#)

## A.L.R. Library

A.L.R. Index, Public Officers and Employees

West's A.L.R. Digest, [Officers and Public Employees](#) 30.1 to 30.55

## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 31, 32, 42](#)

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§ 57. Generally

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 30.1 to 30.5

The "incompatibility of office doctrine" stands for the proposition that the same person may not hold two offices incompatible with each other as a matter of public policy,[[FN1](#)] with such policy recognizing that it is the duty of a public officer to discharge his or her duties uninfluenced by the duties and obligations of another office.[[FN2](#)] There is no constitutionally protected right to hold incompatible offices, and the rule against holding incompatible offices does not result in an unconstitutional infringement of personal and political rights.[[FN3](#)]

A state has a legitimate interest in preventing one person from holding multiple public offices,[[FN4](#)] and the manifest purposes of a restriction on multiple office-holding are to prevent offices and places of public trust from accumulating in a single person,[[FN5](#)] and to prevent individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding.[[FN6](#)] Even if the duties do not conflict, the consolidation of government functions in a single person could adversely affect freedom of expression by others.[[FN7](#)]

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[[FN1](#)] [Unified School Dist. No. 501, Shawnee County, Kan. v. Baker, 269 Kan. 239, 6 P.3d 848, 146 Ed. Law Rep. 902 \(2000\).](#)

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[[FN2](#)] [LaGrange City Council v. Hall Bros. Co. of Oldham County, Inc., 3 S.W.3d 765 \(Ky. Ct. App. 1999\).](#)

- Public policy demands that an office holder discharge his or her duties with undivided loyalty, and the doctrine of incompatibility is intended to insure that there be the appearance, as well as the actuality, of impartiality and undivided loyalty. [People ex rel. Smith v. Brown, 356 Ill. App. 3d 1096, 293 Ill. Dec. 336, 828 N.E.2d 306 \(3d Dist. 2005\).](#)

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[[FN3](#)] [Tarpo v. Bowman Public School Dist. No. 1, 232 N.W.2d 67 \(N.D. 1975\); Haskins v. State ex rel. Harrington, 516 P.2d 1171, 70 A.L.R.3d 1171 \(Wyo. 1973\).](#)

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[[FN4](#)] [Bellon v. Deshotel, 370 So. 2d 221 \(La. Ct. App. 3d Cir. 1979\).](#)

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[[FN5](#)] [Doyle v. City of Dearborn, 370 Mich. 236, 121 N.W.2d 473 \(1963\); Town of Ramapo v. Watton, 90 Misc. 2d 914, 396 N.Y.S.2d 599 \(Sup 1977\); Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 \(1977\).](#)

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[[FN6](#)] [Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 \(1977\).](#)

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[[FN7](#)] [Bellon v. Deshotel, 370 So. 2d 221 \(La. Ct. App. 3d Cir. 1979\).](#)

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**§ 58. Nature and determination of incompatibility**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 30.1

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 31](#) (Complaint, petition, or declaration—Action for declaratory judgment—To determine compatibility of offices of county building inspector and township trustee—By county building inspector elected to position of township trustee)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 32](#) (Answer—Defense—Compatibility of two offices held by respondent)

Incompatibility is found in the character of the offices and their relation to each other,[FN1] in the subordination of the one to the other,[FN2] and in the nature of the duties and functions which attach to them.[FN3] In determining incompatibility, a crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.[FN4] Offices are generally considered incompatible where their duties and functions are inherently inconsistent and repugnant,[FN5] so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.[FN6]

Two public offices are incompatible where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office.[FN7] Thus, incompatibility exists whenever the statutory functions and duties of the offices require the officer to choose one obligation over another.[FN8]

Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment.[FN9] Rather than examining whether there has been an actual conflict in the two public offices in which a person is serving, courts look to whether there will eventually be a conflict.[FN10] If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if

the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.[FN11]

Incompatibility exists only when the two offices or positions are held by one individual, and it does not exist where the two offices or positions are held by two separate individuals, even though such individuals are husband and wife.[FN12] The holding of two positions that may interrelate is not per se incompatible.[FN13] There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same.[FN14]

**Observation:** Some authority holds that the mere physical inability to perform or discharge the duties of two offices does not constitute incompatibility,[FN15] although other authority holds that public offices are incompatible when it is physically impossible for one person to discharge the duties of both offices.[FN16]

## CUMULATIVE SUPPLEMENT

### Cases:

City positions of alderman, park district commissioner, and school board member were incompatible, and thus officeholder who held all three positions was required to be removed, even if all three positions generally served the same constituency of city residents; alderman had duty on city council to decide whether to allocate revenue-sharing funds to a school district, while a school board member had duty to provide revenue to maintain the schools, city and school district could contract with each other for property transactions, traffic regulation and fire protection, and city and park district could be involved in real estate transactions. [People ex rel. Alvarez v. Price, 408 Ill. App. 3d 457, 350 Ill. Dec. 105, 948 N.E.2d 174 \(1st Dist. 2011\).](#)

### [END OF SUPPLEMENT]

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[FN1] [Webb v. Carter County Fiscal Court, 165 S.W.3d 490 \(Ky. Ct. App. 2005\); State v. Lee, 78 N.D. 489, 50 N.W.2d 124 \(1951\).](#)

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[FN2] [§ 59.](#)

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[FN3] [Knuckles v. Board of Educ. of Bell County, 272 Ky. 431, 114 S.W.2d 511 \(1938\); Jones v. Kolbeck, 119 N.J. Super. 299, 291 A.2d 378 \(App. Div. 1972\); State v. Lee, 78 N.D. 489, 50 N.W.2d 124 \(1951\).](#)

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[FN4] [In re Guerra, 235 S.W.3d 392 \(Tex. App. Corpus Christi 2007\), reh'g overruled, \(Oct. 16, 2007\).](#)

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[FN5] [Poynter v. Walling, 54 Del. 409, 177 A.2d 641 \(Super. Ct. 1962\); State v. Lee, 78 N.D. 489, 50 N.W.2d 124 \(1951\); State ex rel. Hover v. Wolven, 175 Ohio St. 114, 23 Ohio Op. 2d 399, 191 N.E.2d 723 \(1963\).](#)

- The doctrine of incompatible offices prohibits an individual from serving in dual capacity if the functions of the offices are inherently inconsistent and repugnant to each other. [In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 \(2000\).](#)

- Multiple public offices are traditionally considered incompatible with one another where the duties of the positions appear inherently inconsistent or repugnant. [Webb v. Carter County Fiscal Court, 165 S.W.3d 490 \(Ky. Ct. App. 2005\).](#)

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[FN6] [State v. Lee, 78 N.D. 489, 50 N.W.2d 124 \(1951\); State ex rel. Hover v. Wolven, 175 Ohio St. 114, 23 Ohio Op. 2d 399, 191 N.E.2d 723 \(1963\).](#)

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[\[FN7\] People ex rel. Barsanti v. Scarpelli, 371 Ill. App. 3d 226, 308 Ill. Dec. 647, 862 N.E.2d 245 \(2d Dist. 2007\), appeal denied, 224 Ill. 2d 593, 312 Ill. Dec. 661, 871 N.E.2d 61 \(2007\).](#)

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[\[FN8\] Hollander v. Watson, 167 N.J. Super. 588, 401 A.2d 560 \(Ch. Div. 1979\), judgment aff'd, 173 N.J. Super. 300, 414 A.2d 275 \(App. Div. 1980\).](#)

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[\[FN9\] Webb v. Carter County Fiscal Court, 165 S.W.3d 490 \(Ky. Ct. App. 2005\); Tarpo v. Bowman Public School Dist. No. 1, 232 N.W.2d 67 \(N.D. 1975\).](#)

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[\[FN10\] People ex rel. Barsanti v. Scarpelli, 371 Ill. App. 3d 226, 308 Ill. Dec. 647, 862 N.E.2d 245 \(2d Dist. 2007\), appeal denied, 224 Ill. 2d 593, 312 Ill. Dec. 661, 871 N.E.2d 61 \(2007\).](#)

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[\[FN11\] Gryzik v. State, 380 So. 2d 1102 \(Fla. Dist. Ct. App. 1st Dist. 1980\).](#)

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[\[FN12\] Coyne v. State ex rel. Thomas, 595 P.2d 970 \(Wyo. 1979\).](#)

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[\[FN13\] Citizens Ass'n of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 359 A.2d 295 \(D.C. 1976\).](#)

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[\[FN14\] Gulbrandson v. Town of Midland, 72 S.D. 461, 36 N.W.2d 655 \(1949\).](#)

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[\[FN15\] Webb v. Carter County Fiscal Court, 165 S.W.3d 490 \(Ky. Ct. App. 2005\); State v. Lee, 78 N.D. 489, 50 N.W.2d 124 \(1951\).](#)

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[\[FN16\] Antolini v. Newton Falls Twp. Joint Fire Dist., 157 Ohio App. 3d 8, 2004-Ohio-1844, 808 N.E.2d 899 \(11th Dist. Trumbull County 2004\).](#)

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**§ 59. Nature and determination of incompatibility—Subordination of one office, and right to interfere with other office as factors**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 30.1

Incompatibility in offices is found whenever one office is subordinate to the other[[FN1](#)] in some of its important and principal duties, and subject in some degree to the other's revisory power.[[FN2](#)] Incompatibility exists where one office is subject to the audit or review of the other.[[FN3](#)] Two offices are incompatible where the incumbent of the one has the power of appointment to the other office or the power to remove its incumbent.[[FN4](#)] Thus, a member of a legislative body may be disqualified from appointment to an office as to which that body either must appoint or confirm the appointment.[[FN5](#)]

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[[FN1](#)] [In re Water Use Permit Applications](#), 94 Haw. 97, 9 P.3d 409 (2000); [Town of Littleton v. Taylor](#), 138 N.H. 419, 640 A.2d 780 (1994); [Antolini v. Newton Falls Twp. Joint Fire Dist.](#), 157 Ohio App. 3d 8, 2004-Ohio-1844, 808 N.E.2d 899 (11th Dist. Trumbull County 2004).

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[[FN2](#)] [Fedder v. McCurdy](#), 768 P.2d 711 (Colo. App 1988); [Gryzik v. State](#), 380 So. 2d 1102 (Fla. Dist. Ct. App. 1st Dist. 1980); [Dunn v. Froehlich](#), 155 N.J. Super. 249, 382 A.2d 686 (App. Div. 1978); [Felkner v. Chariho Regional School Committee](#), 968 A.2d 865 (R.I. 2009); [Haskins v. State ex rel. Harrington](#), 516 P.2d 1171, 70 A.L.R.3d 1171 (Wyo. 1973).

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[[FN3](#)] [Webb v. Carter County Fiscal Court](#), 165 S.W.3d 490 (Ky. Ct. App. 2005); [Dupras v. County of Clinton](#), 213 A.D.2d 952, 624 N.Y.S.2d 309 (3d Dep't 1995).

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[[FN4](#)] [Tarpo v. Bowman Public School Dist. No. 1](#), 232 N.W.2d 67 (N.D. 1975).

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[[FN5](#)] [Gigliotti v. Berg](#), 40 A.D.2d 182, 338 N.Y.S.2d 706 (4th Dep't 1972).

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**§ 60. Distinction between doctrines of incompatible offices and conflict of interest**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#)

While it has been said that two offices or positions are incompatible if there are many potential conflicts of interest between the two,[\[FN1\]](#) in general, the doctrine of incompatibility of offices is not equivalent to that of conflict of interest.[\[FN2\]](#) The doctrine of incompatibility of office or position involves a conflict of duties between two offices or positions. While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. The doctrine of incompatibility of office or position requires the involvement of two governmental offices or positions.[\[FN3\]](#) The vacating of one office will solve a public official's dilemma of two incompatible offices, although this is not necessarily the case in conflict of interest situations.[\[FN4\]](#)

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[\[FN1\]](#) [§ 58](#).

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[\[FN2\]](#) [Town of Littleton v. Taylor, 138 N.H. 419, 640 A.2d 780 \(1994\); Coyne v. State ex rel. Thomas, 595 P.2d 970 \(Wyo. 1979\).](#)

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[\[FN3\]](#) [Coyne v. State ex rel. Thomas, 595 P.2d 970 \(Wyo. 1979\).](#)

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[\[FN4\]](#) [Detroit Area Agency on Aging v. Office of Services to the Aging, 210 Mich. App. 708, 534 N.W.2d 229 \(1995\).](#)

- As to the taking of a second, incompatible office as resulting in the vacation or the implied resignation from the first office, generally, see [§ 61](#).

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**§ 61. Acceptance of incompatible office as vacating or implying resignation of first office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 42](#) (Complaint, petition, or declaration—For declaratory relief and injunction—Validity of state statute requiring resignation of civil service employee on filing for political office)

Under prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign, the first office.[FN1] The rule that one vacates the prior office upon acceptance of the second is designed to affirm public policy objectives, not the least of which is to insure continuing certainty with regard to who holds a public office.[FN2] Under some provisions prohibiting dual office-holding, it is not until an officer holder actually takes the required oath for the second office that the vacation of the first office occurs.[FN3] The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, in the absence of a special constitutional or statutory provision giving it that effect.[FN4]

**Practice Tip:** Statutes imposing a vacation of office on one taking another office do not function automatically to oust the person from office. If the office is not voluntarily vacated or abandoned, some notification in ouster proceedings are necessary.[FN5]

**Observation:** The rule of ipso facto vacancy of an office by acceptance of a second office does not apply where, under applicable constitutional or statutory provisions, the holder of a public office is rendered ineligible for a specified time for a second public office; under such circumstances it is the second office which is considered vacant rather than the first office.[FN6]

[FN1] [State ex rel. Butera v. Lombardi](#), 146 Conn. 299, 150 A.2d 309 (1959); [In re Request of Governor for Advisory Opinion](#), 722 A.2d 307 (Del. 1998); [Gryzik v. State](#), 380 So. 2d 1102 (Fla. Dist. Ct. App. 1st Dist. 1980); [McLendon v. Everett](#), 205 Ga. 713, 55 S.E.2d 119 (1949); [State v. Villeza](#), 85 Haw. 258, 942 P.2d 522 (1997); [Held v. Hall](#), 191 Misc. 2d 427, 741 N.Y.S.2d 648 (Sup 2002); [State, on Inf. Hayden v. Hill](#), 181 Or. 585, 184 P.2d 366 (1947); [Ashmore v. Greater Greenville Sewer Dist.](#), 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397 (1947); [In re Guerra](#), 235 S.W.3d 392 (Tex. App. Corpus Christi 2007), reh'g overruled, (Oct. 16, 2007).

- As to state statutes or constitutional provisions providing that the holders of certain offices automatically resign their positions if they become candidates for any other elective office as generally not violating either the First or the 14th Amendment of the United States Constitution, see [Am. Jur. 2d, Elections § 259](#).

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[FN2] [Advisory Opinion to Governor](#), 121 R.I. 64, 394 A.2d 1355 (1978).

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[FN3] [Nesbitt v. Apple](#), 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected, (Mar. 8, 1995).

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[FN4] [Advisory Opinion to Governor](#), 121 R.I. 64, 394 A.2d 1355 (1978).

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[FN5] [Trimble County Fiscal Court v. Trimble County Bd. of Health](#), 587 S.W.2d 276 (Ky. Ct. App. 1979).

- As to removal from office, generally, see [§§ 168 et seq.](#)

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[FN6] [State ex rel. Van Antwerp v. Hogan](#), 283 Ala. 445, 218 So. 2d 258 (1969).

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## § 62. Common law

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 30.1

### A.L.R. Library

[Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632](#)

Even in the absence of express constitutional[[FN1](#)] or statutory[[FN2](#)] prohibitions against the holding by one person of more than one office at the same time, it is the rule at common law that a public officer cannot simultaneously hold two incompatible offices.[[FN3](#)] The common-law doctrine developed to preclude one person from holding two public offices, the duties of which could give rise to possible conflicts of governmental, as distinguished from personal or private, interests.[[FN4](#)]

Common-law incompatibility is declared by the courts without the aid of specific constitutional or statutory prohibition when the two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest.[[FN5](#)] The common-law rule operates only when natural incompatibility exists.[[FN6](#)]

**Observation:** While the common-law rule against incompatibility has not been restricted only to office-holding but has sometimes been interpreted to include public employment as well,[[FN7](#)] in some jurisdictions the application of the doctrine is restricted to two public offices and has no application when one of the positions is an employment rather than a public office.[[FN8](#)]

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[[FN1](#)] §§ 64 et seq.

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[[FN2](#)] § 63.

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[[FN3](#)] [Murach v. Planning and Zoning Com'n of City of New London](#), 196 Conn. 192, 491 A.2d 1058 (1985); [Osetek v. City of Chicopee](#), 370 Mass. 110, 345 N.E.2d 897 (1976); [Reilly v. Ozzard](#), 33 N.J. 529, 166 A.2d 360, 89 A.L.R.2d 612 (1960); [Town of Ramapo v. Watton](#), 90 Misc. 2d 914, 396 N.Y.S.2d 599 (Sup 1977); [Tarpo v. Bowman Public School Dist. No. 1](#), 232 N.W.2d 67 (N.D. 1975); [Cummings v. Godin](#), 119 R.I. 325, 377 A.2d 1071 (1977); [In re Guerra](#), 235 S.W.3d 392 (Tex. App. Corpus Christi 2007), reh'g overruled, (Oct. 16, 2007).

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[[FN4](#)] [Crain v. Gibson](#), 73 Mich. App. 192, 250 N.W.2d 792 (1977).

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[[FN5](#)] [LaGrange City Council v. Hall Bros. Co. of Oldham County, Inc.](#), 3 S.W.3d 765 (Ky. Ct. App. 1999).

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[[FN6](#)] [Advisory Opinion to Governor](#), 121 R.I. 64, 394 A.2d 1355 (1978).

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[[FN7](#)] [Dupras v. County of Clinton](#), 213 A.D.2d 952, 624 N.Y.S.2d 309 (3d Dep't 1995); [Otradovec v. City of Green Bay](#), 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984).

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## § 63. Statutory and other codified provisions

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#)

State statutes frequently prohibit the simultaneous holding of a public office and other specified public appointment or employment.[\[FN1\]](#) A statute prohibiting dual office-holding is an expression of a state's public policy to prevent public officials from acting in circumstances in which their personal interest conflicts with the public whose interest they have been elected to represent.[\[FN2\]](#) Statutes prohibiting dual office-holding have been upheld against constitutional claims of violating the equal protection clause[\[FN3\]](#) and the First Amendment.[\[FN4\]](#)

The holding of two particular offices also is sometimes prohibited by professional codes of conduct.[\[FN5\]](#)

The statutory prohibition of the holding at the same time of certain specified offices does not so exhaust the subject as to preclude application of the common-law doctrine prohibiting dual holding of incompatible offices with respect to offices beyond the terms of the statutory interdiction.[\[FN6\]](#)

**Observation:** Some states have enacted statutes which specifically provide for particular officials to serve in different offices simultaneously, so as to defeat assertions of incompatibility of holding such offices at the same time.[\[FN7\]](#) Thus, a state legislature may override the common-law doctrine of incompatible offices as it deems appropriate or necessary.[\[FN8\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Any potential overlap between term-limited city council member's expiring term of office, under municipal charter that provided that her successor's term would begin "on the day following the general election," and her term of office if elected to the Florida House of Representatives in the same election, which would begin "upon election," was insufficient to trigger the requirements of the "resign-to-run" law; law's purpose of denying a candidate a safe haven to which to retreat if defeated was not being compromised, and any doubts as to city council member's qualifications as a candidate were required to be resolved in her favor. [West's F.S.A. Const. Art. 3, § 15](#); [West's F.S.A. § 99.012](#)(3)(a). [Ruiz v. Farias](#), 43 So. 3d 124 (Fla. Dist. Ct. App. 3d Dist. 2010).

The legislature's motive in enacting the Dual Officeholding and Dual Employment Law (DODEL) was to eliminate the existence of the threat posed by the inherent conflict and the intangible accrual of power stemming from dual employment. [LSA-R.S. 42:65](#). [Foti v. Holliday](#), 27 So. 3d 813 (La. 2009).

The "ex officio" or "incidental duties" exception to the ban on dual-office holding in the South Carolina Constitution may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the "ex officio" office, and preserves inviolate the central feature of separation of powers in the Constitution. Const. [Art. 1, § 8](#), Art. 3, § 24, [Art. 6, § 3](#). [Segars-Andrews v. Judicial Merit Selection Com'n](#), 691 S.E.2d 453 (S.C. 2010).

### [END OF SUPPLEMENT]

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[FN1] [Stolberg v. Caldwell](#), 175 Conn. 586, 402 A.2d 763 (1978); [Wheeler County Bd. of Tax Assessors v. Gilder](#), 256 Ga. App. 478, 568 S.E.2d 786 (2002); [People ex rel. Smith v. Wilson](#), 357 Ill. App. 3d 204, 293 Ill. Dec. 716, 828 N.E.2d 1214 (3d Dist. 2005), as modified without opinion on denial of reh'g, (June 10, 2005); [Hughes v. Region VII Area Agency on Aging](#), 277 Mich. App. 268, 744 N.W.2d 10 (2007); [Com. ex rel. MacElree v. Legree](#), 530 Pa. 381, 609 A.2d 155 (1992); [Fraleay v. Civil Service Com'n](#), 177 W. Va. 729, 356 S.E.2d 483 (1987).

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[FN2] [Dykeman v. Symonds](#), 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976).

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[FN3] [Arceneaux v. Treen](#), 671 F.2d 128 (5th Cir. 1982); [Oklahoma State Election Bd. v. Coats](#), 1980 OK 65, 610 P.2d 776 (Okla. 1980).

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[FN4] [Galer v. Board of Regents of the University System](#), 239 Ga. 268, 236 S.E.2d 617 (1977).

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[FN5] [Sanderson v. Ethics Committee of the Kentucky Judiciary](#), 804 S.W.2d 10 (Ky. 1991).

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[FN6] [Reilly v. Ozzard](#), 33 N.J. 529, 166 A.2d 360, 89 A.L.R.2d 612 (1960).

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[FN7] [Kramer v. City of Dearborn Heights](#), 197 Mich. App. 723, 496 N.W.2d 301 (1992); [Columbia County Administrative School Dist. No. 5 Joint v. Prichard](#), 36 Or. App. 643, 585 P.2d 701 (1978).

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[FN8] [In re Water Use Permit Applications](#), 94 Haw. 97, 9 P.3d 409 (2000).

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**§ 64. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#)

Some state constitutions expressly prohibit dual appointments to public offices,[\[FN1\]](#) or the holding of more than one office,[\[FN2\]](#) although there is nothing in the United States Constitution which prevents it.[\[FN3\]](#) State constitutional provisions limiting a public official's eligibility to become a candidate for another public office have been upheld as not violative of federal constitutional guarantees of equal protection and freedom of speech.[\[FN4\]](#)

**CUMULATIVE SUPPLEMENT**

**Cases:**

Service on the Judicial Merit Selection Commission (JMSC), which determined whether judicial candidates were qualified before the legislature elected judges from list submitted by JMSC, by members of the General Assembly, did not violate dual-office provisions of the South Carolina Constitution, though service on the JMSC was a constitutional office, as service on the JMSC was reasonably incidental to the full and effective exercise of members' legislative powers. Const. Art. 3, § 24, Art. 5, § 27, Art. 6, § 3; Code 1976, § 2–19–10. [Segars-Andrews v. Judicial Merit Selection Com'n, 691 S.E.2d 453 \(S.C. 2010\).](#)

**[END OF SUPPLEMENT]**

[FN1] [Advisory Opinion to the Governor-Dual Office-Holding, 630 So. 2d 1055, 89 Ed. Law Rep. 321 \(Fla. 1994\); Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\), as corrected, \(Mar. 8, 1995\); In re Sundlun, 585 A.2d 1185 \(R.I. 1991\); Wentworth v. Meyer, 839 S.W.2d 766 \(Tex. 1992\).](#)

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[FN2] [Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77 \(1999\).](#)

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[FN3] [U.S. v. Thompson, 475 F.2d 1359 \(5th Cir. 1973\).](#)

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[FN4] [Clements v. Fashing, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 \(1982\).](#)

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**§ 65. Provision as to separation of powers as basis**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#), [30.3](#)

Arguments that dual office-holding is prohibited have been based on constitutional provisions pertaining to separation of governmental powers.[FN1] Thus, for example, under a constitutional provision which prohibited legislators from performing executive functions, legislative members could not join a commission which would perform functions that were exclusively within the province of the executive branch.[FN2]

[FN1] [Gaskin v. Beier](#), 622 N.E.2d 524 (Ind. Ct. App. 1993); [Myers v. City of McComb](#), 943 So. 2d 1 (Miss. 2006); [State ex rel. Stratton v. Roswell Independent Schools](#), 111 N.M. 495, 806 P.2d 1085, 66 Ed. Law Rep. 450 (Ct. App. 1991).

- As to constitutional provisions pertaining to separation of governmental departments, generally, see [Am. Jur. 2d, Constitutional Law §§ 246 et seq.](#)

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[FN2] [Murphy v. State](#), 233 Ga. 681, 212 S.E.2d 839 (1975).

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**§ 66. Construction and proof of application**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [30.1](#)

If the constitutional prohibition against multiple public office holding is clear and unambiguous, it is limited to those persons who hold more than one of the various offices expressly mentioned in such constitutional prohibition.[FN1] Where a constitutional provision prohibiting dual office-holding is deemed as representing a denial of a right to a citizen,[FN2] if it cannot be clearly demonstrated that one falls within its proscription, or equally plainly shown that he or she is in violation of its purpose, that individual is entitled to be held free of its prohibition.[FN3]

Where the illegality of holding two positions is declared by a constitutional provision, no factual incompatibility need be shown.[FN4] If, however, the constitutional provision prohibits the holding of an office



and simultaneously acting as an officer or in another specified governmental or public position, a showing that the person was serving in an office may be required.[FN5] Furthermore, where the holding of simultaneous offices of particular governmental bodies or subdivisions is prohibited, it may be necessary to show that such offices are within the specified bodies or subdivisions to be incompatible.[FN6]

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[FN1] [Bray v. Brown, 258 Va. 618, 521 S.E.2d 526 \(1999\).](#)

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[FN2] As to office-holding as a right, generally, see [§ 12](#).

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[FN3] [Baker v. Hazen, 133 Vt. 433, 341 A.2d 707 \(1975\).](#)

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[FN4] [Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 \(1978\).](#)

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[FN5] [In re Sundlun, 585 A.2d 1185 \(R.I. 1991\); Powell v. State, 898 S.W.2d 821 \(Tex. Crim. App. 1994\).](#)

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[FN6] [Advisory Opinion to the Governor-Dual Office-Holding, 630 So. 2d 1055, 89 Ed. Law Rep. 321 \(Fla. 1994\).](#)

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**§ 67. Prohibitions regarding lucrative offices or offices of trust, profit, or emolument**

**West's Key Number Digest**

The United States Constitution provides that no senator or representative may, during the time for which he or she was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his or her continuance in office.<sup>[FN1]</sup> Furthermore, various state constitutions preclude any member of Congress,<sup>[FN2]</sup> or any person holding or exercising any office under the United States,<sup>[FN3]</sup> or office of trust or profit under the United States,<sup>[FN4]</sup> sometimes with specified exceptions,<sup>[FN5]</sup> from holding or exercising any office of trust<sup>[FN6]</sup> or profit<sup>[FN7]</sup> in the state. Constitutional provisions have also precluded—

— a person holding a lucrative office<sup>[FN8]</sup> or appointment<sup>[FN9]</sup> under the United States or under the state from holding a seat in the state legislature.

— a state legislator from appointment or election to any office during the term for which he or she is elected, the emoluments of which office were increased during the term for which he or she was elected to the legislature.<sup>[FN10]</sup>

— a state legislator from appointment to an office which has been created or the salary of which has been increased while he or she was a member of the legislature.<sup>[FN11]</sup>

— a state legislator from holding any other office or position of profit under the United States or the state.<sup>[FN12]</sup>

— a senator or representative, during the term for which he or she was elected, from eligibility for any civil office of profit created in the state.<sup>[FN13]</sup>

— a state officer from simultaneously being an officer of any municipality.<sup>[FN14]</sup>

— a judge or justice from holding any other office, accepting any appointment or public trust,<sup>[FN15]</sup> or holding any other office of honor or trust.<sup>[FN16]</sup>

— a person from holding more than one lucrative office,<sup>[FN17]</sup> or two offices of honor or profit, at the same time,<sup>[FN18]</sup> or holding or exercising at the same time, more than one civil office of emolument.<sup>[FN19]</sup>

A constitutional provision prohibiting persons elected to the legislature from receiving civil appointments within the state refers to nonlegislative offices and is not a bar to mobility within the legislature and therefore does not prohibit an incumbent state representative from being a candidate to fill a vacancy in the state senate.<sup>[FN20]</sup>

**Observation:** Under a constitutional provision prohibiting a member of the legislature from receiving remuneration from other state offices while a member of the legislature, a member of the legislature who held the position of deputy prosecuting attorney at the same time and accepted funds for performing those duties could not be required to return the funds to the state, which would then be in the position of accepting a windfall; such a construction should not be given to a constitutional prohibition unless the context clearly indicates that such a penalty should be exacted.<sup>[FN21]</sup>

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<sup>[FN1]</sup> [U.S. Const. Art. I, § 6, cl. 2.](#)

[FN2] [Opinion of the Justices, 647 A.2d 1104 \(Del. 1994\)](#); [Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\)](#), as corrected, (Mar. 8, 1995).

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[FN3] [Opinion of the Justices, 647 A.2d 1104 \(Del. 1994\)](#).

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[FN4] [Lasher v. Com. ex rel. Matthews, 418 S.W.2d 416 \(Ky. 1967\)](#).

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[FN5] [Opinion of the Justices, 647 A.2d 1104 \(Del. 1994\)](#).

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[FN6] [Lasher v. Com. ex rel. Matthews, 418 S.W.2d 416 \(Ky. 1967\)](#); [Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\)](#), as corrected, (Mar. 8, 1995).

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[FN7] [Opinion of the Justices, 647 A.2d 1104 \(Del. 1994\)](#); [Lasher v. Com. ex rel. Matthews, 418 S.W.2d 416 \(Ky. 1967\)](#); [Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\)](#), as corrected, (Mar. 8, 1995).

- As to what constitutes a lucrative office, or office of profit or emolument, generally, see [§ 22](#).

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[FN8] [Gaskin v. Beier, 622 N.E.2d 524 \(Ind. Ct. App. 1993\)](#); [In re Carlisle, 209 S.W.3d 93 \(Tex. 2006\)](#).

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[FN9] [Gaskin v. Beier, 622 N.E.2d 524 \(Ind. Ct. App. 1993\)](#).

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[FN10] [Warwick v. State ex rel. Chance, 548 P.2d 384 \(Alaska 1976\)](#); [Fair v. State Election Bd. of Oklahoma, 1994 OK 101, 879 P.2d 1223 \(Okla. 1994\)](#); [Brown v. Meyer, 787 S.W.2d 42 \(Tex. 1990\)](#); [State ex rel. Anderson v. Chapman, 86 Wash. 2d 189, 543 P.2d 229 \(1975\)](#).

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[FN11] [Warwick v. State ex rel. Chance, 548 P.2d 384 \(Alaska 1976\)](#).

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[FN12] [Begich v. Jefferson, 441 P.2d 27 \(Alaska 1968\)](#).

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[FN13] [Lawless v. Jubelirer, 789 A.2d 820 \(Pa. Commw. Ct. 2002\)](#), order aff'd, [571 Pa. 79, 811 A.2d 974 \(2002\)](#); [Brown v. Meyer, 787 S.W.2d 42 \(Tex. 1990\)](#).

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[FN14] [Court of Justice ex rel. Administrative Office of the Courts v. Oney, 34 S.W.3d 814 \(Ky. Ct. App. 2000\)](#).

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[FN15] [State ex rel. Carenbauer v. Hechler, 208 W. Va. 584, 542 S.E.2d 405 \(2000\)](#).

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[FN16] [Green v. Giuliani, 187 Misc. 2d 138, 721 N.Y.S.2d 461 \(Sup 2000\)](#).

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[FN17] [Thompson v. Hays, 867 N.E.2d 654 \(Ind. Ct. App. 2007\)](#), transfer denied, [878 N.E.2d 210 \(Ind. 2007\)](#).

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[FN18] [Richardson v. Town of Mount Pleasant, 350 S.C. 291, 566 S.E.2d 523 \(2002\)](#).

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[FN19] [Powell v. State, 898 S.W.2d 821 \(Tex. Crim. App. 1994\)](#).

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[\[FN20\] State ex rel. Nelson v. Yuma County Bd. of Sup'rs, 109 Ariz. 448, 511 P.2d 630 \(1973\); Vaughn v. Sullivan, 391 Mich. 1, 214 N.W.2d 320 \(1974\).](#)

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[\[FN21\] Martindale v. Honey, 261 Ark. 708, 551 S.W.2d 202 \(1977\).](#)

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### Primary Authority

[U.S. Const. Art. VI, cl. 3](#)

[5 U.S.C.A. § 3113](#)

[18 U.S.C.A. §§ 1901, 1907, 2071\(b\)](#)

[42 U.S.C.A. §§ 2000e-2, 2000e-16](#)

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### **§ 68. Age**

#### **West's Key Number Digest**

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[Validity of age requirement for state public office, 90 A.L.R.3d 900](#)

State constitutional provisions often require qualified voters in the state to be of a specified age in order to be eligible for office by election.[[FNI](#)]

The courts have upheld minimum-age requirements for public office under a rational basis standard, by reasoning that there is some relationship between age and the maturity needed to conduct public office. Thus, the courts have upheld, as not being violative of equal protection, state constitutional provisions fixing a

minimum age for all elective offices,[FN2] state constitutional or statutory provisions for a minimum age for specific state offices,[FN3] and a state statute or local charter fixing a minimum age for specific local offices.[FN4]

The courts also have held that the First Amendment right to freedom of association is not abridged by an age requirement for public office which necessarily restricts the range of choice available to the voter.[FN5] Age requirements for state legislative offices fall with equal weight on all voters and do not permanently exclude any candidates.[FN6]

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[FN1] Minneapolis Term Limits Coalition v. Keefe, 535 N.W.2d 306 (Minn. 1995); Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

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[FN2] Meyers v. Roberts, 310 Minn. 358, 246 N.W.2d 186, 90 A.L.R.3d 893 (1976).

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[FN3] Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990); Mengelkamp v. List, 88 Nev. 542, 501 P.2d 1032 (1972); Wurtzel v. Falcey, 69 N.J. 401, 354 A.2d 617 (1976).

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[FN4] Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) (city council); Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973) (school board candidates); Human Rights Party of Ann Arbor v. Secretary of State for State of Mich., 370 F. Supp. 921 (E.D. Mich. 1973), judgment aff'd, 414 U.S. 1058, 94 S. Ct. 563, 38 L. Ed. 2d 465 (1973) (school board).

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[FN5] Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973); Meyers v. Roberts, 310 Minn. 358, 246 N.W.2d 186, 90 A.L.R.3d 893 (1976).

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[FN6] Wurtzel v. Falcey, 69 N.J. 401, 354 A.2d 617 (1976).

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**§ 69. Religious beliefs or practices**

**West's Key Number Digest**

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The United States Constitution provides that no religious test may ever be required as a qualification for any office under the United States.[FN1] Thus, a state constitutional provision which in effect bars every person who refuses to declare a belief in God from holding public office in the state unconstitutionally invades the freedom of belief and religion of an appointee to a public office, and cannot be enforced against him or her.[FN2] A state statute[FN3] or constitutional provision[FN4] which disqualifies priests or ministers of any denomination from serving as state legislators also is unconstitutional as violating the rights of clergymen in the free exercise of their religion.

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[FN1] [U.S. Const. Art. VI, cl. 3.](#)

- As to federal laws prohibiting discrimination based on religion, generally, see, [Am. Jur. 2d, Job Discrimination §§ 124 et seq.](#)

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[FN2] [Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 \(1961\).](#)

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[FN3] [McDaniel v. Paty, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 \(1978\).](#)

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[FN4] [Kirkley v. State of Md., by Mandel, 381 F. Supp. 327 \(D. Md. 1974\).](#)

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§ 70. Residence

West's Key Number Digest

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A.L.R. Library

[Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 A.L.R.3d 1048](#)

While, at common law, there are no residential requirements for candidates for elective offices,[[FN1](#)] insofar as residential requirements for the holding of public office or of particular offices are imposed by constitutional or statutory provisions, such provisions are controlling,[[FN2](#)] and such requirements must be strictly construed.[[FN3](#)] State statutory residency requirements for office, however, may not contravene state constitutional residency requirements.[[FN4](#)] Such provisions may require a specific duration of residence;[[FN5](#)] may require residence in a specific political subdivision,[[FN6](#)] in a specific geographic area, or within a specified distance or travel time from the workplace;[[FN7](#)] and may provide that an office will be vacant upon the incumbent's ceasing to be an inhabitant of the political subdivision of which he or she is required to be a resident when chosen.[[FN8](#)]

The purpose of residency provisions is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding.[[FN9](#)] Residency requirements for public office and employment have been upheld against equal protection challenges,[[FN10](#)] and have been upheld where they are the least restrictive means available to achieve the interests of the state.[[FN11](#)] Such requirements, however, have been struck down where they are not the least restrictive method available to achieve the desired purpose.[[FN12](#)]

**Observation:** Some authority holds that the term "residence" used in residence provisions applicable to the holding of public office refers to "domicile,"[[FN13](#)] and may be construed as synonymous with the term "domicile,"[[FN14](#)] although other authority holds the terms are not synonymous for the purpose of establishing residency requirements under such provisions.[[FN15](#)]

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[[FN1](#)] [Thompson v. Dickson](#), 202 Or. 394, 275 P.2d 749 (1954).

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[[FN2](#)] [State ex rel. Repay v. Fodeman](#), 30 Conn. Supp. 82, 300 A.2d 729 (Super. Ct. 1972); [Gallagher v. Board of Sup'rs of Elections](#), 219 Md. 192, 148 A.2d 390 (1959).

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[[FN3](#)] [State ex rel. Sandy v. Johnson](#), 212 W. Va. 343, 571 S.E.2d 333 (2002).

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[FN4] [Lucas v. Woodward](#), 240 Ga. 770, 243 S.E.2d 28 (1978).

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[FN5] [Reale v. Board of Real Estate Appraisers](#), 880 P.2d 1205 (Colo. 1994); [Minneapolis Term Limits Coalition v. Keefe](#), 535 N.W.2d 306 (Minn. 1995).

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[FN6] [State ex rel. Addis v. McClenen](#), 119 Ohio St. 3d 500, 2008-Ohio-4924, 895 N.E.2d 532 (2008).

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[FN7] [Lash v. City of Traverse City](#), 479 Mich. 180, 735 N.W.2d 628 (2007).

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[FN8] [Hosley v. Curry](#), 85 N.Y.2d 447, 626 N.Y.S.2d 32, 649 N.E.2d 1176 (1995).

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[FN9] [Lewis v. Gibbons](#), 80 S.W.3d 461 (Mo. 2002).

- A durational residency requirement tends to increase the probability that potential office seekers will be exposed to the needs of the state and its citizens, and that the state might reasonably believe that potential candidates will be motivated to become knowledgeable about issues of importance within their particular districts. [Walker v. Yucht](#), 352 F. Supp. 85 (D. Del. 1972).

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[FN10] [Association of Cleveland Fire Fighters v. City of Cleveland, Ohio](#), 502 F.3d 545 (6th Cir. 2007); [Gusewelle v. City of Wood River](#), 374 F.3d 569 (7th Cir. 2004); [Russell v. Hathaway](#), 423 F. Supp. 833 (N.D. Tex. 1976).

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[FN11] [Castner v. City of Homer](#), 598 P.2d 953 (Alaska 1979).

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[FN12] [Zeilenga v. Nelson](#), 4 Cal. 3d 716, 94 Cal. Rptr. 602, 484 P.2d 578 (1971).

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[FN13] [Handel v. Powell](#), 284 Ga. 550, 670 S.E.2d 62 (2008).

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[FN14] [Young v. Stevens](#), 968 So. 2d 1260 (Miss. 2007); [Hosley v. Curry](#), 85 N.Y.2d 447, 626 N.Y.S.2d 32, 649 N.E.2d 1176 (1995).

- As to the definition of "domicile" or "domicil," and the relation of that term to "residence," generally, see [Am. Jur. 2d, Domicil §§ 1, 8, 9](#).

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[FN15] [Smith v. Goins](#), 994 So. 2d 591 (La. Ct. App. 3d Cir. 2008), writ denied, 988 So. 2d 244 (La. 2008).

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**§ 71. Property ownership**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [23](#)

As a general rule, the ownership of land as a prerequisite to holding elective office constitutes an invidious discrimination against nonlandowners, a sort of economic gerrymandering which runs afoul of the equal protection and due process clauses of the United States Constitution.<sup>[FN1]</sup> Thus, offices of general governmental responsibility usually cannot be limited to freeholders, and exceptions to this rule, if any, must be limited to special purpose governments whose impact is limited to real-property interests.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120 \(1967\).](#)

- It was a form of invidious discrimination, prohibited by the equal protection clause of the United States Constitution's 14th Amendment under a rationality standard of review, to require that all appointees to a body authorized to propose reorganization of local government be owners of real property. [Quinn v. Millsap, 491 U.S. 95, 109 S. Ct. 2324, 105 L. Ed. 2d 74 \(1989\).](#)

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<sup>[FN2]</sup> [Woodward v. City of Deerfield Beach, 538 F.2d 1081 \(5th Cir. 1976\).](#)

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§ 72. Sex

West's Key Number Digest

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Under the Civil Rights Act of 1964, discrimination based on sex is prohibited against any employee or applicant for employment in the federal government,[[FN1](#)] as well as in state governments and their political subdivisions and agencies.[[FN2](#)] The Government Employee Rights Act of 1991 forbids such discrimination on the part of the executive branch of the federal government,[[FN3](#)] and by persons elected to public office in any state or political subdivision of any state.[[FN4](#)]

**Observation:** State fair employment and equal pay laws frequently identify public employers to which provisions prohibiting discrimination on the basis of sex apply.

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[[FN1](#)] [42 U.S.C.A. § 2000e-16\(a\)](#).

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[[FN2](#)] [42 U.S.C.A. § 2000e-2\(a\)](#).

- As to sexual discrimination in employment being prohibited, generally, see [Am. Jur. 2d, Job Discrimination §§ 135 et seq.](#)

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[[FN3](#)] [Am. Jur. 2d, Job Discrimination § 68](#).

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[[FN4](#)] [Am. Jur. 2d, Job Discrimination § 75](#).

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**§ 73. Citizenship**

**West's Key Number Digest**

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The Constitution and statutes of the United States and of the several states usually make citizenship one of the requirements for eligibility for public office and employment.<sup>[FN1]</sup> The use of citizenship as a basis for qualification for elective office is not prohibited from the privileges and immunities clause of the United States Constitution.<sup>[FN2]</sup> Thus, a state may deny aliens the right to run for an elective office.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Aliens and Citizens § 1879.](#)

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<sup>[FN2]</sup> [Lee v. Minner, 458 F.3d 194 \(3d Cir. 2006\).](#)

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<sup>[FN3]</sup> [U.S. v. Toner, 728 F.2d 115, 15 Fed. R. Evid. Serv. 66 \(2d Cir. 1984\).](#)

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**§ 74. Race, color, or national origin**

**West's Key Number Digest**

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A person may not be denied the privilege of holding public office on account of his or her race.<sup>[FN1]</sup> The United States Constitution prohibits any federal or state law from requiring race discrimination in job hiring.<sup>[FN2]</sup> Federal legislation, such as the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, or national origin against any employee or applicant for employment in the federal government,<sup>[FN3]</sup> as well as in state governments and their political subdivisions and agencies.<sup>[FN4]</sup> The Government Employee Rights Act of 1991 also forbids such discrimination on the part of the executive branch of the federal government<sup>[FN5]</sup> and by persons elected to public office in any state or political subdivision of any state.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Scott v. Taylor, 470 F.3d 1014 \(11th Cir. 2006\).](#)

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<sup>[FN2]</sup> [Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 \(1963\).](#)

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<sup>[FN3]</sup> [42 U.S.C.A. § 2000e-16\(a\).](#)

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<sup>[FN4]</sup> [42 U.S.C.A. § 2000e-2\(a\).](#)

- As to discrimination in employment on the basis of race or color as being prohibited, generally, see [Am. Jur. 2d, Job Discrimination §§ 115 et seq.](#)

- As to discrimination in employment on the basis of national origin as being prohibited, generally, see [Am. Jur. 2d, Job Discrimination §§ 147 et seq.](#)

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<sup>[FN5]</sup> [Am. Jur. 2d, Job Discrimination § 68.](#)

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<sup>[FN6]</sup> [Am. Jur. 2d, Job Discrimination § 75.](#)

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## § 75. Generally

### West's Key Number Digest

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Allegations of criminal conduct are relevant to an official's fitness for office,[\[FN1\]](#) and persons convicted of certain crimes may be constitutionally or statutorily prohibited from holding a public office. Thus, one may be disqualified from public office for conviction of:

- a crime punishable by imprisonment in the state penitentiary[\[FN2\]](#)
- embezzlement of public money[\[FN3\]](#)
- bribery[\[FN4\]](#)
- forgery[\[FN5\]](#)
- perjury[\[FN6\]](#) or swearing falsely under oath[\[FN7\]](#)
- theft[\[FN8\]](#)
- felonies involving moral turpitude[\[FN9\]](#)
- an infamous crime[\[FN10\]](#)

An individual may be constitutionally disqualified from being a candidate for, or holding, a public office if he or she has pled nolo contendere to certain crimes.[\[FN11\]](#)

Provisions prohibiting persons committing crimes from holding public office are intended to assure the requisite good character of those individuals whom citizens look to for governance,[\[FN12\]](#) to promote honesty and integrity in candidates for, and holders of, public office,[\[FN13\]](#) and to preserve public confidence in

government, to prevent dishonesty involving the public resources, and to prevent the use of public office for private gain.[FN14] Such provisions have been upheld against challenges on equal protection grounds,[FN15] and are mandatory and cannot be altered by sentencing plea bargain agreements.[FN16]

**Observation:** One's disqualification under a provision disqualifying a person from public office based on a conviction for a felony involving moral turpitude has been deemed not to violate the principle of double jeopardy, since the purpose of such provision was not to impose an additional penalty upon convicted felons, but merely to designate a reasonable ground of eligibility for holding public office in the state.[FN17]

Certain federal statutes disqualify a person from holding office or employment if he or she commits the prohibited acts.[FN18]

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[FN1] [Thomas v. City of Monroe Louisiana, 833 So. 2d 1282 \(La. Ct. App. 2d Cir. 2002\).](#)

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[FN2] [Reed v. State ex rel. Davis, 961 So. 2d 89 \(Ala. 2006\).](#)

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[FN3] [James v. Thompson, 392 So. 2d 1178 \(Ala. 1981\); State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 \(2005\); State ex rel. Wier v. Peterson, 369 A.2d 1076 \(Del. 1976\); Petition of Hughes, 516 Pa. 89, 532 A.2d 298 \(1987\), opinion issued, 516 Pa. 90, 532 A.2d 298 \(1987\).](#)

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[FN4] [James v. Thompson, 392 So. 2d 1178 \(Ala. 1981\); State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 \(2005\); State ex rel. Wier v. Peterson, 369 A.2d 1076 \(Del. 1976\); Petition of Hughes, 516 Pa. 89, 532 A.2d 298 \(1987\), opinion issued, 516 Pa. 90, 532 A.2d 298 \(1987\); Gelch v. State Bd. of Elections, 482 A.2d 1204 \(R.I. 1984\).](#)

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[FN5] [State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 \(2005\).](#)

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[FN6] [James v. Thompson, 392 So. 2d 1178 \(Ala. 1981\); State ex rel. Wier v. Peterson, 369 A.2d 1076 \(Del. 1976\).](#)

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[FN7] [Com. ex rel. Corbett v. Large, 715 A.2d 1226 \(Pa. Commw. Ct. 1998\).](#)

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[FN8] [State ex rel. Watkins v. Fiorenzo, 71 Ohio St. 3d 259, 1994-Ohio-104, 643 N.E.2d 521 \(1994\).](#)

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[FN9] [Haynes v. Wells, 273 Ga. 106, 538 S.E.2d 430 \(2000\).](#)

- As to when a criminal act involves moral turpitude, see [Am. Jur. 2d, Criminal Law § 22.](#)

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[FN10] [State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 \(2005\); In re Request of Governor for Advisory Opinion, 950 A.2d 651 \(Del. 2008\), as revised, \(June 25, 2008\); Coles v. Ryan, 91 Ill. App. 3d 382, 46 Ill. Dec. 879, 414 N.E.2d 932 \(2d Dist. 1980\); State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 \(1968\); Commonwealth ex rel. Pennsylvania Attorney General Corbett v. Griffin, 596 Pa. 549, 946 A.2d 668 \(2008\).](#)

- As to when a criminal act involves an infamous crime, generally, see [Am. Jur. 2d, Criminal Law § 23.](#)

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[FN11] [State ex rel. Webb v. Cianci, 591 A.2d 1193 \(R.I. 1991\).](#)

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[FN12] [Com. ex rel. Baldwin v. Richard, 561 Pa. 489, 751 A.2d 647 \(2000\).](#)

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[\[FN13\] Paey v. Rodrigue, 119 N.H. 186, 400 A.2d 51 \(1979\).](#)

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[\[FN14\] State, Law Enforcement Standards Bd. v. Village of Lyndon Station, 98 Wis. 2d 229, 295 N.W.2d 818 \(Ct. App. 1980\), judgment aff'd, 101 Wis. 2d 472, 305 N.W.2d 89 \(1981\).](#)

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[\[FN15\] Malone v. Tubbs, 825 So. 2d 585 \(La. Ct. App. 2d Cir. 2002\), writ denied, 824 So. 2d 1164 \(La. 2002\) and writ denied, 826 So. 2d 1110 \(La. 2002\); Paey v. Rodrigue, 119 N.H. 186, 400 A.2d 51 \(1979\).](#)

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[\[FN16\] Com. ex rel. Baldwin v. Richard, 561 Pa. 489, 751 A.2d 647 \(2000\).](#)

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[\[FN17\] McIntyre v. Miller, 263 Ga. 578, 436 S.E.2d 2 \(1993\).](#)

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[\[FN18\] 5 U.S.C.A. § 3113; 18 U.S.C.A. §§ 1901, 1907, 2071\(b\).](#)

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**§ 76. Disqualification in state as affected by conviction under federal law or law of another state**

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Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office, 39 A.L.R.3d 303

There is some difference of opinion across jurisdictions as to whether conviction of an offense in a federal court will disqualify a person from holding state office. Federal law does not prevent a state from barring a federal felon from holding public office in the state,[[FN1](#)] and some states specifically prohibit a person convicted of certain crimes under the laws of the state or the United States from holding an office.[[FN2](#)] In some states, the conviction of a felony under federal law disqualifies a person from holding public office under state constitutional provisions and statutes which disqualify persons convicted of a felony,[[FN3](#)] an infamous crime,[[FN4](#)] or a crime manifesting moral turpitude.[[FN5](#)] There is also some authority, however, for the view that a conviction of a felony under federal law will disqualify a person from holding public office under state law if the offense for which he or she was convicted would also be a felony under state law, but not if the offense would be only a misdemeanor.[[FN6](#)]

Similarly, the courts have reached different conclusions as to whether a conviction of a crime in one state will disqualify a person from holding office in another state. Some authority has held that a conviction of assault in one state does not disqualify a person from holding office in another.[[FN7](#)] Other authority, however, specifically prohibits a person convicted of certain crimes under the laws of the state or any other state from holding an office,[[FN8](#)] or has held that a statutory disqualification for a crime manifesting moral turpitude applies with equal force to a conviction entered in a sister state,[[FN9](#)] or that a conviction, when used in a specific disability provision for public officers, includes a conviction in another state.[[FN10](#)]

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[[FN1](#)] [Malone v. Shyne](#), 936 So. 2d 1279 (La. Ct. App. 2d Cir. 2006), writ granted, 936 So. 2d 820 (La. 2006) and judgment aff'd, 937 So. 2d 343 (La. 2006).

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[[FN2](#)] [State ex rel. Gains v. Thomas](#), 128 Ohio App. 3d 107, 713 N.E.2d 1123 (7th Dist. Mahoning County 1998).

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[[FN3](#)] [Hayes v. Williams](#), 341 F. Supp. 182 (S.D. Tex. 1972); [Hulgan v. Thornton](#), 205 Ga. 753, 55 S.E.2d 115 (1949); [State ex rel. Dean v. Haubrich](#), 248 Iowa 978, 83 N.W.2d 451 (1957); [State ex inf. Peach v. Goins](#), 575 S.W.2d 175 (Mo. 1978); [Hughes v. Oklahoma State Election Bd.](#), 1966 OK 67, 413 P.2d 543 (Okla. 1966).

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[[FN4](#)] [Petition of Hughes](#), 516 Pa. 89, 532 A.2d 298 (1987), opinion issued, 516 Pa. 90, 532 A.2d 298 (1987).

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[[FN5](#)] [People ex rel. Ryan v. Coles](#), 64 Ill. App. 3d 807, 21 Ill. Dec. 543, 381 N.E.2d 990 (2d Dist. 1978).

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[[FN6](#)] [State ex rel. Arpagaus v. Todd](#), 225 Minn. 91, 29 N.W.2d 810, 175 A.L.R. 776 (1947); [Melton v. Oleson](#), 165 Mont. 424, 530 P.2d 466 (1974).

- A person who was convicted of aiding and abetting mail fraud, a felony under federal law, and sentenced to six months in prison, was not disqualified from holding office by virtue of a state statute which provided that every person convicted of a felony and sentenced to a penitentiary, which required a sentence of one year or more, was disqualified from holding office, because the legislature could not have intended that a greater disability should result from a conviction and sentence in federal court than could have resulted had the same sentence been imposed in a court of the state. [Stiner v. Musick](#), 571 S.W.2d 149 (Tenn. 1978).

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[[FN7](#)] [Guttermann v. State, by Ervin](#), 141 So. 2d 21 (Fla. Dist. Ct. App. 1st Dist. 1962).

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[\[FN8\] State ex rel. Gains v. Thomas, 128 Ohio App. 3d 107, 713 N.E.2d 1123 \(7th Dist. Mahoning County 1998\).](#)

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[\[FN9\] People ex rel. Ryan v. Coles, 64 Ill. App. 3d 807, 21 Ill. Dec. 543, 381 N.E.2d 990 \(2d Dist. 1978\).](#)

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[\[FN10\] State ex rel. Wier v. Peterson, 369 A.2d 1076 \(Del. 1976\).](#)

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## **§ 77. Time when ineligibility arises**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 31

### **A.L.R. Library**

[What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139](#)

A conviction of a crime, for the purpose of an exclusion from public office, generally is not completed until a court has entered judgment and sentence.[\[FN1\]](#) If the jury's verdict has been set aside, or is under review and thus subject to be set aside, either by a motion for a new trial, a bill of exception, or some other appropriate procedure, there is no conviction within the meaning of a provision providing for forfeiture of the right to hold office upon being convicted, since the conviction is not final.[\[FN2\]](#) Under some exclusionary provisions,

however, a conviction is not required, and a judicial finding that a person has committed the prohibited act is sufficient to disqualify that person from holding a public office.[FN3]

The suspension of a person's prison sentence does not nullify the underlying conviction for purposes of a provision prohibiting those convicted of certain crimes from holding a public office.[FN4]

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[FN1] [Slawik v. Folsom](#), 410 A.2d 512 (Del. 1979); [Kitsap County Republican Central Committee v. Huff](#), 94 Wash. 2d 802, 620 P.2d 986 (1980).

- As to what constitutes a conviction sufficient to remove one from public office, see [§ 192](#).

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[FN2] [Summerour v. Cartrett](#), 220 Ga. 31, 136 S.E.2d 724 (1964).

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[FN3] [State ex rel. Martinez v. Padilla](#), 94 N.M. 431, 612 P.2d 223 (1980).

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[FN4] [Commonwealth ex rel. Pennsylvania Attorney General Corbett v. Griffin](#), 596 Pa. 549, 946 A.2d 668 (2008).

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**§ 78. Effect of expungement or voiding of conviction; restoration of eligibility**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [31](#)

The mere fact of a prior conviction does not render an individual constitutionally ineligible to hold a public office without regard to whether the conviction has been expunged or avoided, and if an individual's conviction has been set aside and declared null and void, that individual is not prohibited from holding public office.[FN1]

Constitutional or statutory provisions precluding eligibility for public office based on convictions of certain types of crimes, often make exceptions based on the restoration of the person's political[FN2] or civil[FN3] rights, or the restoration of the person's rights to eligibility to office by terms of a pardon for the offense.[FN4] Although a pardon does not restore a person to a public office forfeited upon conviction of the crime for which the pardon was issued, a pardon may restore to the pardoned offender his or her eligibility for the office which was forfeited, in certain circumstances.[FN5] Some authority, however, holds that a disqualification from public office following conviction for a specified crime cannot be removed by pardon.[FN6]

Some constitutional and statutory provisions prohibit a person disqualified to hold public office due to a conviction for certain crimes from attaining or returning to office until a specified time period has passed,[FN7] and further condition one's restored eligibility for office on the absence of a subsequent conviction for another crime of the type which subjected him or her to disqualification during the applicable period.[FN8]

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[FN1] [Powers v. Bryant](#), 309 Ark. 568, 832 S.W.2d 232 (1992).

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[FN2] [State ex rel. Chavez v. Evans](#), 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

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[FN3] [McIntyre v. Miller](#), 263 Ga. 578, 436 S.E.2d 2 (1993).

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[FN4] [Swan v. LaFollette](#), 231 Wis. 2d 633, 605 N.W.2d 640 (Ct. App. 1999).

- The automatic pardon provision of the state constitution, which permits automatic pardon to a first offender upon the completion of his or her sentence, does not restore a convicted felon's right to hold public office as would a full pardon by the governor. [State ex rel. Moreau v. Castillo](#), 971 So. 2d 1081 (La. Ct. App. 1st Cir. 2007), writ denied, 964 So. 2d 349 (La. 2007) and cert. denied, 128 S. Ct. 896, 169 L. Ed. 2d 748 (2008).

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[FN5] [Am. Jur. 2d, Pardon and Parole § 61](#).

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[FN6] [State v. Oldner](#), 361 Ark. 316, 206 S.W.3d 818 (2005).

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[FN7] [McIntyre v. Miller](#), 263 Ga. 578, 436 S.E.2d 2 (1993); [State ex rel. Webb v. Cianci](#), 591 A.2d 1193 (R.I. 1991).

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[FN8] [McIntyre v. Miller](#), 263 Ga. 578, 436 S.E.2d 2 (1993).

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**§ 79. Political affiliation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 18, 25, 35

Political affiliation may be an appropriate requirement for a public position or office,[[FN1](#)] if such affiliation is necessary for the effective performance of the public position or office involved.[[FN2](#)] The position or office must relate to partisan political interests or concerns.[[FN3](#)] Specifically, political affiliation may be an appropriate consideration or requirement for public positions that may be characterized as confidential[[FN4](#)] or policy making.[[FN5](#)] It is the duties and responsibilities inherent in the position itself that determine if political affiliation is an appropriate employment consideration.[[FN6](#)]

Political affiliation may be an acceptable requirement for an employee who acts as an adviser or formulates plans for the implementation of broad goals.[[FN7](#)] In this regard, if an employee's private political beliefs would interfere with the discharge of his or her public duties, his or her First Amendment rights may be required to yield to the state's vital interest in maintaining government effectiveness and efficiency.[[FN8](#)]

**Observation:** The continued employment of an assistant public defender could not properly be conditioned upon the assistant public defender's allegiance to the political party in control of the county government where the primary, if not the only, responsibility of an assistant public defender was to represent individual citizens in controversy with the state.[[FN9](#)]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Question in determining whether political affiliation is legitimate factor for public hiring authority to consider is whether hiring authority can demonstrate that party affiliation is appropriate requirement for effective performance of public office involved. [U.S.C.A. Const.Amend. 1, Shumek v. McDowell, 743 F. Supp. 2d 472 \(M.D. Pa. 2010\).](#)

**[END OF SUPPLEMENT]**

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[FN1] [Berry v. Illinois Dept. of Transp., 333 F. Supp. 2d 751 \(C.D. Ill. 2004\).](#)

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[FN2] [Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 \(1980\); Cardona-Martinez v. Rodriguez-Quinones, 444 F.3d 25 \(1st Cir. 2006\); Kiddy-Brown v. Blagojevich, 408 F.3d 346 \(7th Cir. 2005\).](#)

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[FN3] [Reyes Canada v. Rey Hernandez, 286 F. Supp. 2d 174 \(D.P.R. 2003\).](#)

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[FN4] [Aviles-Martinez v. Monroig, 963 F.2d 2 \(1st Cir. 1992\); Wallikas v. Harder, 118 F. Supp. 2d 303 \(N.D. N.Y. 2000\).](#)

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[FN5] [Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon, 310 F.3d 1 \(1st Cir. 2002\); Wallikas v. Harder, 118 F. Supp. 2d 303 \(N.D. N.Y. 2000\).](#)

- In the context of a political patronage case, the test for whether a position involves policymaking is whether the position authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation. [Kiddy-Brown v. Blagojevich, 408 F.3d 346 \(7th Cir. 2005\).](#)

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[FN6] [Sowards v. Loudon County, Tenn., 203 F.3d 426, 2000 FED App. 0046P, 123 A.L.R.5th 783 \(6th Cir. 2000\); Berry v. Illinois Dept. of Transp., 333 F. Supp. 2d 751 \(C.D. Ill. 2004\).](#)

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[FN7] [Peters v. Delaware River Port Authority of Pennsylvania and New Jersey, 16 F.3d 1346 \(3d Cir. 1994\).](#)

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[FN8] [Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 \(1980\); Vojvodich v. Lopez, 48 F.3d 879 \(5th Cir. 1995\).](#)

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[FN9] [Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 \(1980\).](#)

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**§ 80. Voter status and eligibility**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [18](#), [25](#), [35](#)

Some state constitutional provisions require that for one to be eligible to hold a public office, one must be a qualified elector,[[FN1](#)] a registered voter,[[FN2](#)] or entitled to vote.[[FN3](#)]

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[[FN1](#)] [Reale v. Board of Real Estate Appraisers](#), 880 P.2d 1205 (Colo. 1994).

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[[FN2](#)] [Haynes v. Wells](#), 273 Ga. 106, 538 S.E.2d 430 (2000).

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[[FN3](#)] [Minneapolis Term Limits Coalition v. Keefe](#), 535 N.W.2d 306 (Minn. 1995).

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**§ 81. Previous tenure of office**

**West's Key Number Digest**

## **A.L.R. Library**

### [Construction and effect of constitutional or statutory provisions disqualifying one for public office because of previous tenure of office, 59 A.L.R.2d 716](#)

A term limit provision is a disqualification from election to office which may be validly imposed upon public offices authorized by a state's constitution.[[FN1](#)] For example, such a provision may disqualify from another term of office a sheriff who has already served a prescribed number of terms of office.[[FN2](#)] Furthermore, a constitutional provision may preclude a legislator from being nominated, elected, or appointed to any other office or position of profit which has been created, for one year after his or her term as a legislator has ended.[[FN3](#)]

Where a constitutional provision creating an office prescribes that the officer must hold it for a certain term, and then imposes on such officer a disability to succeed himself or herself, some authority will construe the disability as attaching only to an officer who has served a full term, with the result that one who has served but a partial term is not rendered ineligible for a subsequent office.[[FN4](#)] Other authority holds that a person who is appointed to fill a vacancy in an office, and who is subsequently elected to that office and serves as the holder of that office during the next succeeding term of office, has served two consecutive terms and is ineligible to be elected to the position for the term immediately following the second of the two consecutive terms, notwithstanding that the person only served a portion of the first term.[[FN5](#)]

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[[FN1](#)] [Cook v. City of Jacksonville, 823 So. 2d 86, 112 A.L.R.5th 701 \(Fla. 2002\).](#)

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[[FN2](#)] [Am. Jur. 2d, Sheriffs, Police, and Constables § 9.](#)

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[[FN3](#)] [Warwick v. State ex rel. Chance, 548 P.2d 384 \(Alaska 1976\).](#)

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[[FN4](#)] [Pommerehn v. Sauley, 233 Ind. 140, 117 N.E.2d 556 \(1954\).](#)

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[[FN5](#)] [State ex rel. Rushford v. Meador, 165 W. Va. 48, 267 S.E.2d 169 \(1980\).](#)

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**§ 82. Removal from office; resignation in anticipation of removal**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [18](#), [25](#), [35](#)

A removal from office generally bars the removed officer from an election or appointment to fill the vacancy for the unexpired term.[[FN1](#)] A removal from office, however, does not disqualify the former office holder from taking some other office or to be elected or appointed to a new term of the same office.[[FN2](#)]

A public officer who anticipates his or her removal from an office for a crime or misconduct, and tenders his or her resignation, is not rendered eligible for election to the vacancy for the balance of the term caused by his or her resignation to escape expulsion.[[FN3](#)]

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[[FN1](#)] [Gelch v. State Bd. of Elections, 482 A.2d 1204 \(R.I. 1984\).](#)

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[[FN2](#)] [Gelch v. State Bd. of Elections, 482 A.2d 1204 \(R.I. 1984\).](#)

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[[FN3](#)] [Recall Bennett Committee v. Bennett, 196 Or. 299, 249 P.2d 479 \(1952\).](#)

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**§ 83. Generally**

**West's Key Number Digest**

Public officers are elected or appointed, not hired.[FN1] To fill an office there must be one already created.[FN2] Since there can be no public officer without a public office,[FN3] no right can be acquired to hold an office that does not exist.[FN4]

The legislature may determine whether offices created by it, and peculiarly under its control, will be filled by election or appointment.[FN5] The power to elect or to appoint a person to a public office, however, is essentially a political power, and is neither inherently legislative, executive, or judicial.[FN6]

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[FN1] [Lambert v. Belknap County Convention](#), 157 N.H. 375, 949 A.2d 709 (2008).

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[FN2] [Pope v. Easley](#), 354 N.C. 544, 556 S.E.2d 265 (2001).

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[FN3] [§ 9](#).

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[FN4] [Holcombe v. Grotz](#), 129 Tex. 100, 102 S.W.2d 1041, 110 A.L.R. 234 (1937).

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[FN5] [Kramer v. Union Free School Dist. No. 15](#), 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

- At least with respect to nonlegislative officers, a state can appoint local officials, or elect them, or combine the elective and appointive systems. [Sailors v. Board of Ed. of Kent County](#), 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967).

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[FN6] [State ex rel. Witcher v. Bilbrey](#), 878 S.W.2d 567 (Tenn. Ct. App. 1994).

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## § 84. Election

### West's Key Number Digest

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The United States Constitution grants the states, through their legislatures, broad powers to prescribe the times, places, and manner of holding elections for senators and representatives,[[FN1](#)] subject to the paramount power of Congress to regulate the conduct of congressional elections.[[FN2](#)] The control and regulation of state and municipal elections also rest with the states.[[FN3](#)] Legislative bodies, such as Congress[[FN4](#)] and state legislatures,[[FN5](#)] have the power to elect their own officers.

A statutory holdover provision does not eliminate a statutory requirement that a proper election be held.[[FN6](#)] When a person with less than the plurality of the votes holds public office instead of the person who really has the plurality of the votes, the person holding office is doing so illegally.[[FN7](#)]

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[[FN1](#)] [Am. Jur. 2d, Elections § 3.](#)

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[[FN2](#)] [Am. Jur. 2d, Elections § 5.](#)

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[[FN3](#)] [Am. Jur. 2d, Elections § 7.](#)

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[[FN4](#)] [Am. Jur. 2d, United States § 8.](#)

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[[FN5](#)] [Am. Jur. 2d, States, Territories, and Dependencies § 56.](#)

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[[FN6](#)] [Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 \(1972\).](#)

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[[FN7](#)] [State ex rel. Shroble v. Prusener, 177 Wis. 2d 656, 503 N.W.2d 301 \(Ct. App. 1993\),](#) decision rev'd on other grounds, [185 Wis. 2d 102, 517 N.W.2d 169 \(1994\).](#)

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[5 U.S.C.A. § 3110](#)

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§ 85. Generally

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 5, 8, 13

The choice of a person to fill an office constitutes the essence of an appointment.[FN1] By the act of appointment, title is vested.[FN2] The imposition of new duties upon an officer already elected or appointed does not constitute the appointment of an officer.[FN3]

It is the duty of a public officer having appointment authority to make the best appointment in his or her power.[FN4] The law invalidates any "bargain" made by a public official to appoint a particular person to office.[FN5]

Neither the good faith of the parties,[FN6] nor the continued employment in an invalidly obtained position, will validate illegal appointments.[FN7] The mere fact that an employee may have worked and been compensated in a supervisory position does not automatically render his or her appointment valid.[FN8]

The power of appointment, once exercised, is exhausted until a new vacancy occurs, and any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant.[FN9]

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[FN1] [Ellis v. Rockefeller](#), 245 Ark. 53, 431 S.W.2d 848 (1968); [Johnson v. Sampson](#), 232 Ky. 648, 24 S.W.2d 306 (1930); [Powell v. Buchanan County](#), 348 Mo. 807, 155 S.W.2d 172 (1941).

- As to civil service appointments, see [Am. Jur. 2d, Civil Service §§ 22 et seq.](#)

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[FN2] [State ex rel. Norman v. Viebranz](#), 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 (1985).

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[FN3] [Evans v. U.S.](#), 48 Ct. Cl. 503, 226 U.S. 567, 33 S. Ct. 133, 57 L. Ed. 353 (1913).

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[FN4] [Hall v. Pierce](#), 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957).

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[FN5] [Hall v. Pierce](#), 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957); [Bartley v. Thompson](#), 198 Wis. 2d 323, 542 N.W.2d 227 (Ct. App. 1995).

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[FN6] [Broadnax v. City of New Haven](#), 270 Conn. 133, 851 A.2d 1113 (2004).

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[FN7] [Cassella v. Civil Service Com'n of City of New Britain](#), 202 Conn. 28, 519 A.2d 67 (1987).

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[\[FN8\] O'Grady v. Cook County Sheriff's Merit Bd., 260 Ill. App. 3d 529, 198 Ill. Dec. 28, 632 N.E.2d 87 \(1st Dist. 1994\).](#)

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[\[FN9\] State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 \(1985\).](#)

- As to the removal of public officers, generally, see [§§ 168 et seq.](#)

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## **§ 86. Effect of absence of vacancy; prospective appointments**

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One cannot be appointed to an office where there is no vacancy, since two persons cannot, at the same time, occupy an office for which only one incumbent is provided by law.[\[FN1\]](#) This rule, however, does not prevent appointments made in anticipation of a vacancy that ultimately occurs.[\[FN2\]](#) An appointing authority may make a prospective appointment, that is, an appointment that fills a prospective vacancy before the vacancy occurs,[\[FN3\]](#) and such appointments are generally valid.[\[FN4\]](#)

A prospective appointment to fill an anticipated vacancy[\[FN5\]](#) or one sure to occur[\[FN6\]](#) in a public office, made by a person or body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a valid appointment,[\[FN7\]](#) which vests title to the office in the appointee.[\[FN8\]](#) In other words, the fact that the incumbent's term has not expired at the time an appointment is made to fill a vacancy in the office does not render the appointment invalid if it is to take effect at the expiration of the incumbent's term and the vacancy will occur during the appointing officer's term of office.[\[FN9\]](#) Thus, where a public officer resigns his or her office to take effect at a future date, and his or her resignation is

accepted, the appointing power being, as then organized, authorized to fill the vacancy when it is to occur, may appoint a successor, the appointment to take effect when the resignation becomes operative.[FN10]

An appointment to office in anticipation of a vacancy is good only when the officer making the appointment is still in office when the vacancy occurs.[FN11] If the term of the appointing body or officer will expire prior to,[FN12] or at the same time as,[FN13] the vacancy will occur, then no power of prospective appointment exists. A public officer or public body having a power of appointment cannot forestall the rights and prerogatives of a successor by making a prospective appointment to fill an office where the appointee's term is not to begin until the appointing power's own term has expired.[FN14]

A statute expressly providing that an appointment must be made at a specific time does not abrogate the general rule regarding prospective appointment, unless the legislative intent to do so is expressed or can be determined.[FN15]

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[FN1] State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 (1985).

- As to vacancies in public office, generally, see §§ 104 et seq.

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[FN2] State ex rel. Barth v. Hamilton Cty. Bd. of Elections, 65 Ohio St. 3d 219, 602 N.E.2d 1130 (1992).

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[FN3] Murphy v. Pearson, 284 Ga. 296, 667 S.E.2d 83 (2008).

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[FN4] State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 (1985); Mullinax v. Garrison, 296 S.C. 370, 373 S.E.2d 471, 49 Ed. Law Rep. 1315 (1988).

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[FN5] Morrison v. Michael, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 (1st Dist. 1979).

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[FN6] State ex rel. Koch v. Lexcen, 131 Mont. 161, 308 P.2d 974 (1957); State ex rel. Oklahoma Tax Commission v. Mourer, 1979 OK 92, 596 P.2d 882 (Okla. 1979).

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[FN7] Morrison v. Michael, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 (1st Dist. 1979); State ex rel. Koch v. Lexcen, 131 Mont. 161, 308 P.2d 974 (1957); State ex rel. Oklahoma Tax Commission v. Mourer, 1979 OK 92, 596 P.2d 882 (Okla. 1979).

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[FN8] State ex rel. Koch v. Lexcen, 131 Mont. 161, 308 P.2d 974 (1957); State ex rel. Oklahoma Tax Commission v. Mourer, 1979 OK 92, 596 P.2d 882 (Okla. 1979).

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[FN9] Faciane v. Bosco, 236 So. 2d 601 (La. Ct. App. 1st Cir. 1970).

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[FN10] Morrison v. Michael, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 (1st Dist. 1979).

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[FN11] Morrison v. Michael, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 (1st Dist. 1979); Tappy v. State ex rel. Byington, 82 So. 2d 161 (Fla. 1955); People v. Dethloff, 283 N.Y. 309, 28 N.E.2d 850 (1940).

- An appointing authority may make a prospective appointment so long as the vacancy to be filled will exist at a time when the appointing authority is still in office. Murphy v. Pearson, 284 Ga. 296, 667 S.E.2d 83 (2008).

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[FN12] Board of Ed. of McCreary County v. Nevels, 551 S.W.2d 15 (Ky. Ct. App. 1977); State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 (1985).

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[\[FN13\] State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 \(1985\).](#)

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[\[FN14\] Morrison v. Michael, 98 Cal. App. 3d 507, 159 Cal. Rptr. 568 \(1st Dist. 1979\); Mosby v. Board of Com'rs of Vanderburgh County, 134 Ind. App. 175, 186 N.E.2d 18 \(1962\); Gonzalez v. Board of Educ. of Elizabeth School Dist., Union County, 325 N.J. Super. 244, 738 A.2d 974, 138 Ed. Law Rep. 1104 \(App. Div. 1999\); State ex rel. Norman v. Viebranz, 19 Ohio St. 3d 146, 483 N.E.2d 1176, 27 Ed. Law Rep. 1221 \(1985\).](#)

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[\[FN15\] Georgia v. Suruda, 154 N.J. Super. 439, 381 A.2d 821 \(Law Div. 1977\).](#)

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**§ 87. Appointments to term extending beyond term of appointing authority**

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**A.L.R. Library**

[Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277](#)

An appointing authority generally may not, in the exercise of its powers, appoint an individual to a term extending beyond its own term of the office.[\[FN1\]](#) The power to appoint an individual for a fixed term that may extend beyond the life of the appointing body only exists when the legislature has granted such power to the

appointing body, and such power to appoint does not exist when the appointee is to serve at the pleasure of the appointing body.[FN2]

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[FN1] Rawlins v. Levy Court of Kent County, 235 A.2d 840 (Del. 1967).

[FN2] Cabarle v. Governing Body of Pemberton Tp., 167 N.J. Super. 129, 400 A.2d 548 (Law Div. 1979), judgment aff'd, 171 N.J. Super. 586, 410 A.2d 281 (App. Div. 1980).

- As to the terms of persons holding office at the pleasure of the appointing authority, generally, see § 145.

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## § 88. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 6, 14, 15

Since a public office is a public agency created in the interest and for the benefit of the people,[FN1] the power of selecting persons for office inherently belongs to the people.[FN2] Yet the people cannot always be called upon to act immediately when the selection of an official is necessary, and therefore, the power of appointment to public offices belongs where the people have chosen to place it by their constitution or laws.[FN3]

In some jurisdictions, appointing authority may be transferred to another by an implied delegation. An implied delegation arises when there is sufficient evidence of past practices and customs over time which show that the appointing authority intended to delegate that authority to another.[FN4]

[\[FN1\] § 3.](#)

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[\[FN2\] People ex rel. Rudman v. Rini, 64 Ill. 2d 321, 1 Ill. Dec. 4, 356 N.E.2d 4 \(1976\); State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 \(1954\).](#)

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[\[FN3\] State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 \(1954\); Lanza v. Wagner, 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344 \(1962\).](#)

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[\[FN4\] Department of Agriculture and Forestry v. Jones, 633 So. 2d 900 \(La. Ct. App. 1st Cir. 1994\), writ denied, 637 So. 2d 482 \(La. 1994\).](#)

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**§ 89. Executive body**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 6, 9

The power of appointment to public office has sometimes been regarded as an executive function.[\[FN1\]](#) The power to appoint to office, however, is not inherent in the executive department unless conferred by a constitutional provision or the legislature,[\[FN2\]](#) and the legislature may confer the power of appointment on a

public officer or board within the executive department.[FN3] Thus, the exercise of the power of appointment to public office usually is not inherently an executive function.[FN4]

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[FN1] [Springer v. Government of Philippine Islands](#), 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928); [Opinion of the Justices](#), 365 Mass. 639, 309 N.E.2d 476 (1974); [Application of O'Sullivan](#), 117 Mont. 295, 158 P.2d 306, 161 A.L.R. 487 (1945).

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[FN2] [Stroger v. Regional Transp. Authority](#), 201 Ill. 2d 508, 268 Ill. Dec. 417, 778 N.E.2d 683 (2002).

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[FN3] [Opinion of the Justices](#), 365 Mass. 639, 309 N.E.2d 476 (1974).

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[FN4] [Leek v. Theis](#), 217 Kan. 784, 539 P.2d 304 (1975).

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## § 90. Legislature

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Since the creation of public offices is primarily a legislative function,[FN1] the legislature has the power to fix the mode of appointment to public office.[FN2] If a constitution does not prescribe the method of

appointment to offices created by the legislature, the legislature can take upon itself the responsibility of selecting persons to be appointed.[FN3]

If a constitution makes the act of appointment an executive power, the power to appoint cannot be exercised by the legislature.[FN4] A constitutional provision providing for confirmation by one branch of the legislature is not the equivalent to an appointment vested in the legislature.[FN5]

The legislature has the authority to change the mode of appointment to all offices created by it.[FN6]

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[FN1] § 43.

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[FN2] Proksa v. Arizona State Schools for the Deaf and the Blind, 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003).

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[FN3] Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975).

- The method of appointment to officer, other than of constitutional officers, is a matter within the discretion of the legislative branch. Stroger v. Regional Transp. Authority, 201 Ill. 2d 508, 268 Ill. Dec. 417, 778 N.E.2d 683 (2002).

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[FN4] Springer v. Government of Philippine Islands, 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928); State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

- Although the legislature is not constitutionally precluded from legislative enactments that authorize itself to appoint an executive officer, such authorization is limited. Marine Forests Soc. v. California Coastal Com'n, 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 (2005).

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[FN5] Biggs v. State, Dept. of Retirement Systems, 28 Wash. App. 257, 622 P.2d 1301 (Div. 2 1981).

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[FN6] McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 322 N.E.2d 758 (1975).

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**§ 91. Private persons or organizations**

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West's Key Number Digest, [Officers and Public Employees](#) 6

**A.L.R. Library**

[Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361](#)

Private persons or organizations may have the power to appoint public officers, and statutes granting the power to appoint public officers to private persons or organizations have been held to be valid against claims that they violate the constitutional division of governmental powers,[[FN1](#)] and the equal protection clause.[[FN2](#)] Delegation to private persons has been held permissible if sufficient safeguards exist,[[FN3](#)] the test being whether the particular delegation is reasonable under the circumstances, considering the purpose and aim of the statute.[[FN4](#)]

Some authority, however, holds that appointive powers cannot be delegated to a private organization, because such an organization, no matter how responsible, is not in the public domain and is not accountable to the people.[[FN5](#)] In this regard, it has been held that the sovereign power of the state cannot be delegated to a private person or group, but must be delegated, if at all, to some public agency, board, or officer.[[FN6](#)]

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[[FN1](#)] [Lanza v. Wagner, 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344 \(1962\).](#)

- As to constitutional provisions as to departmental separation of governmental powers, generally, see [Am. Jur. 2d, Constitutional Law §§ 246 et seq.](#)

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[[FN2](#)] [In re Opinion of the Justices, 252 Ala. 559, 42 So. 2d 56 \(1949\); Cohen v. State, 52 Misc. 2d 324, 275 N.Y.S.2d 719 \(Sup 1966\).](#)

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[[FN3](#)] [Evers v. Board of Medical Examiners, 516 So. 2d 650 \(Ala. Civ. App. 1987\).](#)

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[[FN4](#)] [Humane Soc. of U. S., New Jersey Branch, Inc. v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 \(1976\).](#)

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[[FN5](#)] [Rogers v. Medical Ass'n of Georgia, 244 Ga. 151, 259 S.E.2d 85 \(1979\).](#)

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[[FN6](#)] [People ex rel. Rudman v. Rini, 64 Ill. 2d 321, 1 Ill. Dec. 4, 356 N.E.2d 4 \(1976\).](#)

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**§ 92. Local authorities**

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The power of appointing local officers is sometimes conferred upon local authorities by constitutional provision.[FN1] In this regard, in some jurisdictions, by reason of constitutional provisions, the legislature has no right to appoint municipal officers,[FN2] and a municipality constitutionally authorized to make its own charter has the right to determine how its officers should be selected.[FN3] In the absence of such constitutional provisions, however, as a general rule, the state legislature has full control over the selection or appointment of municipal officers.[FN4]

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[FN1] [Resnick v. Ulster County](#), 44 N.Y.2d 279, 405 N.Y.S.2d 625, 376 N.E.2d 1271 (1978).

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[FN2] [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 97.](#)

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[FN3] [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 117.](#)

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[FN4] [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 96.](#)

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**§ 93. Appointing authority or member**

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It is sometimes considered to be contrary to public policy to permit an officer having appointing power to use such power to confer an office on herself or himself in the absence of specific legislative authorization,[[FN1](#)] or to permit an appointing body to appoint one of its own members.[[FN2](#)] In some states, however, no common law principle exists prohibiting a governmental body from appointing one of its own members to a position over which it has appointment power.[[FN3](#)] Some authority further holds that in the absence of an express prohibition, an appointing officer of the executive branch of government may legally appoint a member of the legislative branch to an appointive office subject to the legislature's jurisdiction, even though confirmation of the appointment by the legislative branch is required.[[FN4](#)]

**Observation:** Some state statutes expressly authorize certain governmental bodies to nominate one of their own members for vacancies in office.[[FN5](#)]

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[[FN1](#)] [Cotlar v. Warminster Tp.](#), 8 Pa. Commw. 163, 302 A.2d 859 (1973).

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[[FN2](#)] [State ex rel. Bove v. McDaniel](#), 52 Del. 304, 157 A.2d 463 (1960); [Hetrich v. County Com'rs of Anne Arundel County](#), 222 Md. 304, 159 A.2d 642 (1960).

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[[FN3](#)] [State ex rel. Clayton v. Board of Regents](#), 635 So. 2d 937, 90 Ed. Law Rep. 1337 (Fla. 1994).

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[\[FN4\] Gigliotti v. Berg, 40 A.D.2d 182, 338 N.Y.S.2d 706 \(4th Dep't 1972\).](#)

- As to confirmation, generally, see [§ 102](#).

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[\[FN5\] Jackson v. Hensley, 715 S.W.2d 605 \(Tenn. Ct. App. 1986\).](#)

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## **§ 94. Relatives; antinepotism provisions or policies**

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Antinepotism provisions or policies prohibit public officials from appointing certain relatives to public offices or positions,[\[FN1\]](#) as well as prohibit public officials from advocating a relative for such appointment.[\[FN2\]](#) Such provisions may further prohibit a relative from accepting an appointment made or advocated by a related public official.[\[FN3\]](#) For example, a federal statute prohibits, with an exception as to individuals eligible for specified preferences, a public official from appointing, employing, promoting, advancing, or advocating therefor, in or to a civilian position in the agency in which he or she is serving or over which he or she exercises jurisdiction or control, any individual who is a relative of such official. Furthermore, the statute provides that an individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such action has been advocated by a public official, serving in or exercising jurisdiction or control of the agency, who is a relative of the individual.[\[FN4\]](#)

**Practice Tip:** If an antinepotism statute does not specifically provide for a private right of action, such a right will not be recognized.[\[FN5\]](#)

[FN1] [Galbut v. City of Miami Beach, 605 So. 2d 466 \(Fla. Dist. Ct. App. 3d Dist. 1992\)](#), opinion adhered to on denial of reh'g, (Oct. 13, 1992) and decision approved, [626 So. 2d 192 \(Fla. 1993\)](#); [Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 \(1985\)](#); [Cain v. State, 855 S.W.2d 714 \(Tex. Crim. App. 1993\)](#).

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[FN2] [Galbut v. City of Miami Beach, 605 So. 2d 466 \(Fla. Dist. Ct. App. 3d Dist. 1992\)](#), opinion adhered to on denial of reh'g, (Oct. 13, 1992) and decision approved, [626 So. 2d 192 \(Fla. 1993\)](#).

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[FN3] [Galbut v. City of Miami Beach, 605 So. 2d 466 \(Fla. Dist. Ct. App. 3d Dist. 1992\)](#), opinion adhered to on denial of reh'g, (Oct. 13, 1992) and decision approved, [626 So. 2d 192 \(Fla. 1993\)](#).

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[FN4] [5 U.S.C.A. § 3110](#).

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[FN5] [Youren v. Tintic School Dist., 2004 UT App 33, 86 P.3d 771 \(Utah Ct. App. 2004\)](#).

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## **§ 95. Validity of antinepotism provisions or policies**

[Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826](#) (secs. 3-6 superseded in part by [Federal and State Constitutional Provisions and State Statutes as Prohibiting Employment Discrimination Based on Heterosexual Conduct or Relationship, 123 A.L.R.5th 411](#))

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Challenges to the validity of antinepotism provisions or policies have been predicated upon federal and state constitutional guarantees of due process,[[FN1](#)] including contentions that such provisions or policies were impermissibly vague[[FN2](#)] or violated equal protection guarantees.[[FN3](#)] Such provisions or policies also have been challenged upon other grounds, including violations of the Ninth Amendment right to privacy,[[FN4](#)] First Amendment rights,[[FN5](#)] and the privileges and immunities clause of the United States Constitution.[[FN6](#)]

Courts generally have upheld the validity of laws or policies regulating nepotism in the public service.[[FN7](#)] Such laws or policies, however, have been held invalid: where the applicable law went further than was deemed reasonably necessary to accomplish its purpose;[[FN8](#)] where the applicable law had the effect of depriving a person of employment, where such person had been lawfully appointed prior to the occurrence of an alleged nepotism violation;[[FN9](#)] and where the applicable law constituted special[[FN10](#)] or class[[FN11](#)] legislation.

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[[FN1](#)] [Lewis v. Spencer](#), 468 F.2d 553 (5th Cir. 1972); [Parsons v. Del Norte County](#), 728 F.2d 1234 (9th Cir. 1984); [Rosenstock v. Scaringe](#), 54 A.D.2d 779, 387 N.Y.S.2d 716 (3d Dep't 1976), order aff'd, 40 N.Y.2d 563, 388 N.Y.S.2d 876, 357 N.E.2d 347 (1976); [Hamilton v. Board of Trustees of Oconee County School Dist.](#), 282 S.C. 519, 319 S.E.2d 717, 19 Ed. Law Rep. 1216 (Ct. App. 1984).

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[[FN2](#)] [Pucci v. Michigan Supreme Court](#), 601 F. Supp. 2d 886 (E.D. Mich. 2009); [State ex inf. Roberts v. Buckley](#), 533 S.W.2d 551 (Mo. 1976); [Cain v. State](#), 855 S.W.2d 714 (Tex. Crim. App. 1993).

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[[FN3](#)] [Espinoza v. Thoma](#), 580 F.2d 346 (8th Cir. 1978); [Com. ex rel. Stumbo v. Crutchfield](#), 157 S.W.3d 621, 196 Ed. Law Rep. 984 (Ky. 2005); [Winrick v. City of Warren](#), 99 Mich. App. 770, 299 N.W.2d 27 (1980); [Turner v. City of Carrollton Civil Service Com'n](#), 884 S.W.2d 889 (Tex. App. Amarillo 1994).

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[[FN4](#)] [Keckeisen v. Independent School Dist.](#) 612, 509 F.2d 1062 (8th Cir. 1975).

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[[FN5](#)] [Chapman v. Gorman](#), 839 S.W.2d 232, 78 Ed. Law Rep. 1128 (Ky. 1992).

- In order to trigger heightened constitutional scrutiny on a claim that the First Amendment associational right to marry has been infringed by a government employer's antinepotism policy, the challenged portion of the policy must be shown to place a direct and substantial burden on the right of marriage. [Vaughn v. Lawrenceburg Power System](#), 269 F.3d 703, 2001 FED App. 0375P (6th Cir. 2001).

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[[FN6](#)] [Opinion to the House of Representatives](#), 80 R.I. 281, 96 A.2d 623 (1953).

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[[FN7](#)] [Keckeisen v. Independent School Dist.](#) 612, 509 F.2d 1062 (8th Cir. 1975); [Parsons v. Del Norte County](#), 728 F.2d 1234 (9th Cir. 1984); [Com. ex rel. Stumbo v. Crutchfield](#), 157 S.W.3d 621, 196 Ed. Law Rep. 984 (Ky. 2005); [Winrick v. City of Warren](#), 99 Mich. App. 770, 299 N.W.2d 27 (1980); [State ex inf. Roberts v. Buckley](#), 533 S.W.2d 551 (Mo. 1976); [Whateley v. Leonia Bd. of Ed.](#), 141 N.J. Super. 476, 358 A.2d 826 (Ch. Div. 1976); [Hamilton v. Board of Trustees of Oconee County School Dist.](#), 282 S.C. 519, 319 S.E.2d 717, 19 Ed. Law Rep. 1216 (Ct. App. 1984); [Collier v. Firemen's and Policemen's Civil Service Com'n of Wichita Falls](#), 817 S.W.2d 404 (Tex. App. Fort Worth 1991), writ denied, (Mar. 11, 1992).

- There is no constitutional right to nepotism. [Bachmeier v. Hoffman](#), 1 P.3d 1236 (Wyo. 2000).

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[[FN8](#)] [Bretz v. City of Center Line](#), 88 Mich. App. 451, 276 N.W.2d 617 (1979).

[\[FN9\] Backman v. Bateman, 1 Utah 2d 153, 263 P.2d 561 \(1953\).](#)

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[\[FN10\] Bradford v. Hammond, 179 Ga. 40, 175 S.E. 18 \(1934\).](#)

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[\[FN11\] Opinion to the House of Representatives, 80 R.I. 281, 96 A.2d 623 \(1953\).](#)

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3. Persons Who May be Appointed or Employed

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## **§ 96. Application of antinepotism provisions or policies**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 8, 9

Some authorities have held antinepotism laws applicable to appointees or employees who had been first employed prior to any alleged acts of nepotism.[\[FN1\]](#) Other authorities, however, have held antinepotism laws inapplicable to employees or appointees who had first been employed prior to the alleged act of nepotism on the basis of which the laws were sought to be applied.[\[FN2\]](#) In this regard, an employee could not be terminated pursuant to a nepotism statute upon the election of the employee's father to a local supervising board, where the terms of the statute related only to the initial hiring of such employees.[\[FN3\]](#)

A "no-spouse" policy has been interpreted in some instances as including unmarried cohabitators living in an "espoused relationship."[\[FN4\]](#)

**Observation:** An antinepotism provision has been applied not only in situations where the person naming or appointing the appointee had absolute and uncontrolled discretion in making the designation, but has also been applied where the appointment was subject to the approval of another.[\[FN5\]](#)

[FN1] [Lewis v. Spencer](#), 468 F.2d 553 (5th Cir. 1972); [Keckeisen v. Independent School Dist.](#) 612, 509 F.2d 1062 (8th Cir. 1975); [Corbin v. Special School Dist. of Fort Smith](#), 250 Ark. 357, 465 S.W.2d 342 (1971).

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[FN2] [State ex inf. Stephens v. Fletchall](#), 412 S.W.2d 423 (Mo. 1967); [New Mexico State Bd. of Ed. v. Board of Ed. of Alamogordo Public School Dist. No. 1](#), 95 N.M. 588, 624 P.2d 530 (1981); [Hinek v. Bowman Public School Dist. No. 1](#), 232 N.W.2d 72 (N.D. 1975).

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[FN3] [New Mexico State Bd. of Ed. v. Board of Ed. of Alamogordo Public School Dist. No. 1](#), 95 N.M. 588, 624 P.2d 530 (1981).

- As to actions for termination of employment, generally, see [§§ 439 et seq.](#)

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[FN4] [Espinoza v. Thoma](#), 580 F.2d 346 (8th Cir. 1978).

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[FN5] [State ex inf. Roberts v. Buckley](#), 533 S.W.2d 551 (Mo. 1976).

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**§ 97. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 5, 13, 17

## Forms

[Am. Jur. Legal Forms 2d §§ 210:9, 210:10](#) (Notice of appointment of public employee)

[Am. Jur. Legal Forms 2d §§ 210:11, 210:12](#) (Acceptance of appointment by public employee)

In order for there to be a valid appointment of a public officer, strict compliance with the statute or constitution granting the power to appoint generally is required.<sup>[FN1]</sup> A civil service appointment must strictly comply with the requirements set forth in the applicable civil service provisions, and substantial compliance is insufficient.<sup>[FN2]</sup> The appointment of an officeholder in violation of the authorizing statute is a nullity.<sup>[FN3]</sup> Irregularities in the appointment procedure for a public office, however, will not divest an employee of his or her statutory rights, at least where those irregularities are the result of a mistake or a dereliction of duty.<sup>[FN4]</sup> Thus, an appointment to an office may be valid even though the appointment is for a term different from that set by statute for the office.<sup>[FN5]</sup>

To constitute an appointment to office there must be some open, unequivocal act of appointment on the part of the officer or body empowered to make it.<sup>[FN6]</sup> An appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed.<sup>[FN7]</sup> Where there is no express provision of law to the contrary, an appointee's acceptance of an office is not necessary to complete the appointment.<sup>[FN8]</sup> Uncompleted appointments are subject to withdrawal.<sup>[FN9]</sup>

**Observation:** A defect in an executive appointment of an officer may be remedied by the subsequent ratification of a legislature.<sup>[FN10]</sup>

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<sup>[FN1]</sup> [Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\).](#)

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<sup>[FN2]</sup> [Davenport v. Reed, 785 A.2d 1058 \(Pa. Commw. Ct. 2001\).](#)

- Statutory provisions regulating appointments under civil service acts are mandatory and must be complied with strictly. [Broadnax v. City of New Haven, 270 Conn. 133, 851 A.2d 1113 \(2004\).](#)

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<sup>[FN3]</sup> [Barrett-Smith v. Barrett-Smith, 110 Wash. App. 87, 38 P.3d 1030 \(Div. 2 2002\).](#)

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<sup>[FN4]</sup> [State ex rel. Newell v. Jackson, 118 Ohio St. 3d 138, 2008-Ohio-1965, 886 N.E.2d 846 \(2008\).](#)

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<sup>[FN5]</sup> [Newman v. Borough of Fair Lawn, Bergen County, 31 N.J. 279, 157 A.2d 314 \(1960\).](#)

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<sup>[FN6]</sup> [Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E.2d 262 \(2d Dist. 1976\); Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\).](#)

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<sup>[FN7]</sup> [National Treasury Employees Union v. Reagan, 663 F.2d 239 \(D.C. Cir. 1981\); Goutos v. U. S., 212 Ct. Cl. 95, 552 F.2d 922 \(1976\); Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E.2d 262 \(2d Dist. 1976\); Smith v. State, 200 Miss. 184, 26 So. 2d 543 \(1946\).](#)

- A "final action," within the meaning of a provision requiring an open meeting for the final action to hire a public employee, does not require a formal motion, and it can simply be an informal proposal resulting in a positive or negative decision, or an actual vote. [Miller v. City of Tacoma, 138 Wash. 2d 318, 979 P.2d 429 \(1999\).](#)

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[\[FN8\] Powell v. Buchanan County, 348 Mo. 807, 155 S.W.2d 172 \(1941\).](#)

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[\[FN9\] In re Governorship, 26 Cal. 3d 110, 160 Cal. Rptr. 760, 603 P.2d 1357 \(1979\).](#)

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[\[FN10\] McIntosh v. Personnel Commission, 117 N.H. 334, 374 A.2d 436 \(1977\).](#)

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## **§ 98. Necessity of writing**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [13](#), [17](#)

An appointment to a public office should be in writing, or there should be some written memorial of the fact of appointment signed and executed by the appointing power, since an appointment to office affects public, and not merely private rights, and should be authenticated in a way that the public may know when and in what manner the duty has been performed.[\[FN1\]](#) Some state statutes specifically require that appointments be made in writing.[\[FN2\]](#) The object of such a statute is to remove disputes concerning oral appointments.[\[FN3\]](#)

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[\[FN1\] State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 68 A.2d 289 \(1949\).](#)

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[\[FN2\] State ex rel. Oklahoma Tax Commission v. Mourer, 1979 OK 92, 596 P.2d 882 \(Okla. 1979\).](#)

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[\[FN3\] Miller v. Board of Com'rs of Beaver County, 1935 OK 429, 171 Okla. 553, 43 P.2d 734 \(1935\).](#)

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**§ 99. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [16](#)

**A.L.R. Library**

[Applicability of doctrine of equitable estoppel to revocation of job appointment by agency of Federal Government, 73 A.L.R. Fed. 399](#)

Although there are circumstances under which an appointment to a public office may be reconsidered and revoked, as a general rule, an appointment is not subject to reconsideration after it is complete and the appointee becomes entitled to the office.[[FN1](#)]

Some statutes authorize the appointing authority, such as a civil service commission, to revoke an appointment upon a finding of facts, which if known prior to the appointment, would have warranted the appointee's disqualification. In such a case, the decision by the appointing authority to revoke an appointment for an enumerated disqualification is a matter of discretion.[[FN2](#)]

If there has been a defect in the civil service appointment process, an appropriate remedy for such is reconsideration of the individual for appointment after the defect in the process has been corrected.[[FN3](#)]



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[\[FN1\] U.S. v. Smith, 286 U.S. 6, 52 S. Ct. 475, 76 L. Ed. 954 \(1932\); Alleman v. Dufresne, 17 So. 2d 70 \(La. Ct. App., Orleans 1944\); Thorne v. Squier, 264 Mich. 98, 249 N.W. 497, 89 A.L.R. 126 \(1933\).](#)

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[\[FN2\] Dolan v. New York State Dept. of Civil Service, 304 A.D.2d 1037, 759 N.Y.S.2d 221 \(3d Dep't 2003\).](#)

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[\[FN3\] Bheemaroo v. City of New York, 141 F. Supp. 2d 446 \(S.D. N.Y. 2001\) \(applying New York law\).](#)

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## **§ 100. Appointments by single officer**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 16

An appointment made by a single executive is irrevocable once completed.[\[FN1\]](#) In such a case, the appointing power cannot revoke the appointment, and the one appointed can only be removed by lawful authority.[\[FN2\]](#)

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[\[FN1\] State ex rel. Jewett v. Satti, 133 Conn. 687, 54 A.2d 272 \(1947\); Tappy v. State ex rel. Byington, 82 So. 2d 161 \(Fla. 1955\); Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E.2d 262 \(2d Dist. 1976\); Alleman v. Dufresne, 17 So. 2d 70 \(La. Ct. App., Orleans 1944\).](#)

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[\[FN2\] Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E.2d 262 \(2d Dist. 1976\).](#)

- As to the removal of public officers, generally, see [§§ 168 et seq.](#)

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## **§ 101. Appointments by collective body**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [14](#), [16](#)

With regard to the appointment of an officer by a collective body, if the vote of the body is subject to reconsideration in accordance with the body's own rules, the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of applicable time limitations.[\[FN1\]](#) If, however, the appointment is final and complete so as to be beyond reconsideration at the meeting at which it is voted, it cannot be taken up for reconsideration at an adjourned or deferred meeting of the same body.[\[FN2\]](#)

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[\[FN1\] Boisvert v. Ontario County, 89 Misc. 2d 183, 391 N.Y.S.2d 49 \(Sup 1977\), judgment aff'd, 57 A.D.2d 1051, 395 N.Y.S.2d 617 \(4th Dep't 1977\).](#)

- As to the recall of public officers, generally, see [§§ 200 et seq.](#)

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[\[FN2\] State v. Hardin, 163 Tenn. 471, 43 S.W.2d 924 \(1931\)](#) (disapproved of on other grounds by, [Howard v. State, 217 Tenn. 556, 399 S.W.2d 738 \(1966\)](#)).

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## § 102. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [13](#), [17](#)

Constitutional or statutory provisions may require that appointments to public office or to certain designated offices be approved or confirmed by somebody other than the appointing power, and until this is done, the appointee may not be legally entitled to the office.[FN1]

There is a distinction between a confirmation of an appointment to public office and the appointment itself.[FN2] In confirming the appointment the legislature or other body does not in any sense choose the appointee;[FN3] confirmation is a separate and distinct function that makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term in that appointed person.[FN4] Confirmation, however, is not needed to make a valid appointment.[FN5]

A confirmation cannot be reconsidered after the executive with appointing authority has been notified of the confirmation and has completed the appointment by issuing a commission to the appointee, and the appointee assumes the office, even though the rules of the confirming body provide for reconsideration.[FN6]

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[FN1] [People ex rel. Warren v. Christian, 58 Wyo. 39, 123 P.2d 368 \(1942\).](#)

- As to the United States Constitution requiring that federal judges be appointed by the President with the advice and consent of the Senate, see [Am. Jur. 2d, Judges § 9.](#)

- As to the United States Constitution requiring that consuls be appointed by the President with the advice and consent of the Senate, see [Am. Jur. 2d, Ambassadors, Diplomats, and Consular Officials § 5.](#)

[\[FN2\] State Police Bd. v. Moore, 244 Ind. 388, 193 N.E.2d 131 \(1963\); Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\); Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\); Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\); Biggs v. State, Dept. of Retirement Systems, 28 Wash. App. 257, 622 P.2d 1301 \(Div. 2 1981\).](#)

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[\[FN3\] State Police Bd. v. Moore, 244 Ind. 388, 193 N.E.2d 131 \(1963\); Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\); Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\); Biggs v. State, Dept. of Retirement Systems, 28 Wash. App. 257, 622 P.2d 1301 \(Div. 2 1981\).](#)

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[\[FN4\] Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\).](#)

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[\[FN5\] Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\).](#)

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[\[FN6\] U.S. v. Smith, 286 U.S. 6, 52 S. Ct. 475, 76 L. Ed. 954 \(1932\).](#)

- As to a commission, generally, see [§ 125](#).

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**§ 103. State offices**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [13](#), [17](#)

State law may provide that the appointment by a governor of public officers of a designated class is subject to confirmation by the state legislature. Such a statute, although not requiring senate confirmation of all executive appointments, does not violate equal protection where it is uniform in effect throughout the state and upon all persons of the given classification.[FN1] Under such a statute, the senate may lawfully nonconfirm and reject the executive's appointment.[FN2] Confirmation by a state legislature of a governor's appointment may be made at a special, as well as at a regular, session, and it is immaterial for what purpose the legislative body may have been called in session.[FN3]

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[FN1] [Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\).](#)

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[FN2] [Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\).](#)

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[FN3] [Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\); State ex rel. Wayne v. Sims, 141 W. Va. 302, 90 S.E.2d 288 \(1955\).](#)

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## **Primary Authority**

[5 C.F.R. §§ 330.101 et seq.](#)

## **A.L.R. Library**

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## **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 18](#)

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## **§ 104. Generally**

**West's Key Number Digest**

## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 18](#) (Petition or application—To oust de facto public officer appointed to fill temporary vacancy)

If a vacancy[[FN1](#)] occurs in a public office, the authority having the power to fill such vacancy may appoint someone to the office.[[FN2](#)] The power of the executive to make a valid appointment does not arise until there is a vacancy in fact,[[FN3](#)] or, as the rule is sometimes stated, it is a condition precedent to the exercise of the power to fill a vacancy in office that such vacancy in fact exists,[[FN4](#)] or that it will surely occur within the time during which the appointing officer or body as then constituted will have authority to fill it.[[FN5](#)] Appointments which fill a prospective vacancy in office before the actual vacancy occurs are generally valid.[[FN6](#)] A purported appointment made in the mistaken belief that there is a vacancy, however, has been held to be a nullity.[[FN7](#)]

Where expressly provided for in a constitution, an appointment to fill a vacancy must be made in the manner provided for by such constitution.[[FN8](#)] If the constitution does not provide for filling vacancies in offices created by it, they are to be filled in the manner provided by the legislature for filling vacancies in general.[[FN9](#)] No provision of the United States Constitution expressly mandates the procedures a state must follow in filling vacancies in its legislature.[[FN10](#)] Indeed, there is no requirement that a vacancy must be filled by an election, and states have wide latitude concerning the method and timing of filling legislative vacancies.[[FN11](#)] An agency's own policy or regulations regarding the filling of vacancies supersedes general regulations to the extent they afford greater rights.[[FN12](#)] The procedures for filling vacancies of particular positions of public officers or employees are sometimes set forth by agreement.[[FN13](#)]

**Observation:** Provided that the state statute at issue does not restrict access to the electoral process or discriminate among classes of voters or political parties, courts apply a deferential standard of review over a state's choice of the manner in which to fill legislative vacancies. Under this standard of review, a state's choice as to how to fill legislative vacancies and when to schedule an election is constitutional so long as legitimate interests rationally support the scheme.[[FN14](#)]

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[[FN1](#)] As to what constitutes a vacancy, generally, see [§ 109](#).

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[[FN2](#)] [Tappy v. State ex rel. Byington](#), 82 So. 2d 161 (Fla. 1955).

- As to federal regulations regarding methods of filling vacancies in the competitive service, see [5 C.F.R. §§ 330.101 et seq.](#)

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[[FN3](#)] [Leek v. Theis](#), 217 Kan. 784, 539 P.2d 304 (1975); [Nesbitt v. Apple](#), 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected without opinion, (Mar. 8, 1995).

- The executive power of appointment cannot be exercised to fill an elective office unless the office is deemed vacant under the law. [Gray v. Bryant](#), 125 So. 2d 846 (Fla. 1960).

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[[FN4](#)] [Molnar v. City of Aurora](#), 38 Ill. App. 3d 580, 348 N.E.2d 262 (2d Dist. 1976); [Faciane v. Bosco](#), 236 So. 2d 601 (La. Ct. App. 1st Cir. 1970).

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[[FN5](#)] [State ex rel. La Nasa v. Hickey](#), 222 La. 17, 62 So. 2d 86 (1952).

- Absent some supervening constitutional or statutory provision to the contrary, an appointing authority cannot validly make an appointment to a public office unless the vacancy to be filled by that appointment will, with

certainty, occur at a time when the appointing authority retains power to make the appointment. [Bryan v. Makosky](#), 380 Md. 603, 846 A.2d 392 (2004).

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[\[FN6\] § 86.](#)

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[\[FN7\] Molnar v. City of Aurora](#), 38 Ill. App. 3d 580, 348 N.E.2d 262 (2d Dist. 1976).

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[\[FN8\] In re Advisory Opinion to Governor](#), 313 So. 2d 717 (Fla. 1975).

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[\[FN9\] State ex rel. Redmond v. Smith](#), 207 Neb. 21, 295 N.W.2d 297 (1980).

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[\[FN10\] Greenwood v. Singel](#), 823 F. Supp. 1207 (E.D. Pa. 1993).

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[\[FN11\] Greenwood v. Singel](#), 823 F. Supp. 1207 (E.D. Pa. 1993).

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[\[FN12\] Kachanis v. Department of Treasury](#), 212 F.3d 1289 (Fed. Cir. 2000).

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[\[FN13\] Deweese v. Tennessee Valley Authority](#), 35 F.3d 538 (Fed. Cir. 1994).

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[\[FN14\] Greenwood v. Singel](#), 823 F. Supp. 1207 (E.D. Pa. 1993).

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## § 105. Elective offices

### West's Key Number Digest

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An appointing authority may be authorized to fill vacancies in offices until an election can be held for this purpose.[FN1] This power of appointment may be qualified, and, in such a case, any appointment made that is not in accordance with such qualification is void, and a vacancy in the office remains.[FN2]

**Observation:** In some instances it is permissible for a state legislature to require that, in an interim appointment to a particular elective office upon a vacancy in such office, a preference must be given to a member of the same political party as the vacating officer.[FN3] In this regard, a statute which vested in a political party the initial authority to appoint an interim replacement for one of its members who vacated a position as a district senator or representative did not violate the United States Constitution.[FN4]

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[FN1] [Republican Committee of Garwood v. Mayor and Council of Borough of Garwood, 140 N.J. Super. 593, 357 A.2d 51 \(Law Div. 1976\).](#)

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[FN2] [Republican Committee of Garwood v. Mayor and Council of Borough of Garwood, 140 N.J. Super. 593, 357 A.2d 51 \(Law Div. 1976\).](#)

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[FN3] [Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 \(1991\).](#)

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[FN4] [Rodriguez v. Popular Democratic Party, 457 U.S. 1, 102 S. Ct. 2194, 72 L. Ed. 2d 628 \(1982\)](#) (holding that the statute did not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties, and that the fact that the appointing party excluded nonmembers from the selection process did not violate the nonmembers' rights of association or deprive them of equal protection of the laws).

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**§ 106. Elective offices—Effect of time of holding subsequent election**

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Laws relative to filling vacancies in elective offices will be construed so as to give the people the opportunity to choose at the earliest possible time the successor to an official they have previously chosen.[FN1] Thus, a county board's failure to call a special election within a reasonable time after a vacancy in office may render the appointee's continuation in office contrary to law.[FN2] In some jurisdictions, however, there is no rule which mandates that vacancies in all elective offices, statewide or local, constitutional or statutory, must be filled at an election held as soon after the occurrence of the vacancy as reasonably possible.[FN3]

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[FN1] [State ex rel. Toledo v. Lucas Cty. Bd. of Elections, 95 Ohio St. 3d 73, 2002-Ohio-1383, 765 N.E.2d 854 \(2002\).](#)

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[FN2] [Wayne County Republican Committee v. Wayne County Bd. of Com'rs, 70 Mich. App. 620, 247 N.W.2d 571 \(1976\).](#)

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[FN3] [Baranello v. Suffolk County Legislature, 126 A.D.2d 296, 513 N.Y.S.2d 444 \(2d Dep't 1987\).](#)

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**§ 107. Officer or body authorized to fill vacancy**

**West's Key Number Digest**

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The power to fill vacancies in state offices generally resides with the governor,[[FN1](#)] although other officials may be charged with the filling of vacancies in particular offices.[[FN2](#)] Thus, a lieutenant governor[[FN3](#)] or specified boards[[FN4](#)] may have the power to fill vacancies in certain offices. A legislature also may be empowered to fill vacancies in some instances,[[FN5](#)] such as upon the creation of a new office.[[FN6](#)]

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[[FN1](#)] [Am. Jur. 2d, Governor § 6.](#)

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[[FN2](#)] [State ex rel. Guthrie v. Chapman, 187 Wash. 327, 60 P.2d 245, 106 A.L.R. 640 \(1936\).](#)

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[[FN3](#)] [Rouse v. Johnson, 234 Ky. 473, 28 S.W.2d 745, 70 A.L.R. 1077 \(1930\).](#)

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[[FN4](#)] [Roberts v. State ex rel. Jackson County Bd. of Com'rs, 151 Ind. App. 83, 278 N.E.2d 285 \(1972\); Rouse v. Johnson, 234 Ky. 473, 28 S.W.2d 745, 70 A.L.R. 1077 \(1930\); State ex rel. Guthrie v. Chapman, 187 Wash. 327, 60 P.2d 245, 106 A.L.R. 640 \(1936\).](#)

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[[FN5](#)] [Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\); Resnick v. Ulster County, 44 N.Y.2d 279, 405 N.Y.S.2d 625, 376 N.E.2d 1271 \(1978\).](#)

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[[FN6](#)] [Marion County Bd. of Com'rs v. Marion County Election Commission, 594 S.W.2d 681 \(Tenn. 1980\).](#)

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**§ 108. Determination of existence of vacancy**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#), [56](#)

It is the right of the appointing authority to determine whether a vacancy exists in each particular case.[[FN1](#)] The appointing authority may be required to make a substantive and real factual determination concerning the reason by which a vacancy has occurred.[[FN2](#)] A provision requiring the appointing authority to determine the facts giving rise to a vacancy, however, does not apply where there has been a formal adjudication of a conviction of an offense involving a violation of an official oath.[[FN3](#)]

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[[FN1](#)] [Leek v. Theis, 217 Kan. 784, 539 P.2d 304 \(1975\).](#)

- The mayor, as the city's appointing officer, had the sole discretion to declare a vacancy, and thus the police civil service commission lacked authority to determine whether a resignation of a police lieutenant created a vacancy to be filled. [Pugh v. Policemen's Civil Service Com'n of City of Beckley, 214 W. Va. 498, 590 S.E.2d 691 \(2003\).](#)

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[[FN2](#)] [Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\),](#) as corrected without opinion, (Mar. 8, 1995).

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[[FN3](#)] [Callender v. District Court for Twentieth Judicial Dist., Ardmore, Carter County, 1981 OK 16, 625 P.2d 627 \(Okla. 1981\).](#)

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§ 109. Generally

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

The word "vacancy," as applied to a public office, generally has no technical meaning,[[FN1](#)] and means, in its ordinary and popular sense, that an office is unoccupied, and that there is no incumbent.[[FN2](#)] "Vacancy" refers not to the incumbent, but to the term or to the office.[[FN3](#)]

An office is vacant, in the eye of the law, whenever it is not occupied by a legally qualified incumbent who has the lawful right to continue in the office until the happening of some future event.[[FN4](#)] An office is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments.[[FN5](#)]

A vacancy does not require that the office be physically vacant.[[FN6](#)] For example, the office may be vacant when it is occupied by one who is not a de jure officer, but a mere usurper.[[FN7](#)]

An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties that pertain to it.[[FN8](#)]

**Observation:** A "vacancy" occurs when an appointee leaves office before the completion of his or her constitutional or statutory term. A term "expires" when the appointee has served to the legally specified termination date.[[FN9](#)]

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[[FN1](#)] [Kash v. Day](#), 239 S.W.2d 959 (Ky. 1951); [State ex rel. Jardine v. Ford](#), 120 Mont. 507, 188 P.2d 422 (1948); [Gelch v. State Bd. of Elections](#), 482 A.2d 1204 (R.I. 1984); [Bradford v. Byrnes](#), 221 S.C. 255, 70 S.E.2d 228 (1952).

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[[FN2](#)] [Marcelle v. DeCuir](#), 671 So. 2d 367 (La. Ct. App. 1st Cir. 1995), writ denied, 667 So. 2d 521 (La. 1995).

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[[FN3](#)] [Gelch v. State Bd. of Elections](#), 482 A.2d 1204 (R.I. 1984).

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[[FN4](#)] [Sacramento County Alliance of Law Enforcement v. County of Sacramento](#), 151 Cal. App. 4th 1012, 60 Cal. Rptr. 3d 202 (3d Dist. 2007); [Kash v. Day](#), 239 S.W.2d 959 (Ky. 1951); [State ex rel. Olsen v. Swanberg](#), 130 Mont. 202, 299 P.2d 446 (1956).

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[\[FN5\] Kash v. Day, 239 S.W.2d 959 \(Ky. 1951\); People v. Mitchell, 298 Mich. 172, 298 N.W. 495 \(1941\); State ex rel. Jardine v. Ford, 120 Mont. 507, 188 P.2d 422 \(1948\).](#)

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[\[FN6\] Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 \(1952\).](#)

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[\[FN7\] Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 \(1952\).](#)

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[\[FN8\] Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E.2d 262 \(2d Dist. 1976\); State ex rel. Foughty v. Friederich, 108 N.W.2d 681 \(N.D. 1961\).](#)

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[\[FN9\] Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, 106 Ed. Law Rep. 1349 \(1996\).](#)

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**§ 110. Effect of constitutional or statutory provisions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#)

The contingencies and events giving rise to vacancies in public offices may be enumerated in state constitutional provisions.[\[FN1\]](#) Statutes may also enumerate the situations that create or constitute vacancies in public office,[\[FN2\]](#) but such a statutory declaration is not essential to the existence of a vacancy.[\[FN3\]](#) If the events that create a vacancy in a public office are enumerated in the constitution, the legislature is prohibited

from enacting any law by which such an event would not create a vacancy.[FN4] The expression in a constitution of certain circumstances that will bring about a vacancy, however, does not necessarily preclude the legislature from prescribing other grounds.[FN5]

**Observation:** As a general rule, there is a strong presumption against a legislative intent to create a condition which may result in a vacancy in a public office.[FN6]

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[FN1] [Grant and McNamee v. Payne, 60 Nev. 250, 107 P.2d 307, 132 A.L.R. 568 \(1940\).](#)

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[FN2] [State ex inf. McKittrick v. Wilson, 350 Mo. 486, 166 S.W.2d 499, 143 A.L.R. 1465 \(1942\).](#)

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[FN3] [McRae v. State ex rel. Hyche, 269 Ala. 241, 112 So. 2d 487, 75 A.L.R.2d 1270 \(1959\).](#)

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[FN4] [People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 71 A.L.R.2d 580 \(1958\).](#)

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[FN5] [State ex inf. McKittrick v. Wilson, 350 Mo. 486, 166 S.W.2d 499, 143 A.L.R. 1465 \(1942\).](#)

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[FN6] [Schweisinger v. Jones, 68 Cal. App. 4th 1320, 81 Cal. Rptr. 2d 183 \(3d Dist. 1998\).](#)

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**§ 111. Offices newly created**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

In general, when a law establishing an office takes effect, a vacancy in the office at once exists,[[FN1](#)] unless the language of the law imports futurity of selection, or unless other restrictions are imposed.[[FN2](#)] Accordingly, a newly created office, which is not filled by the tribunal which created it, becomes vacant on the instant of its creation,[[FN3](#)] and remains so until it is filled by an incumbent.[[FN4](#)] The term "vacancy" thus applies to an existing office without an incumbent, though it has never been filled.[[FN5](#)]

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[[FN1](#)] [Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 \(1952\).](#)

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[[FN2](#)] [Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 \(1952\).](#)

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[[FN3](#)] [Sacramento County Alliance of Law Enforcement v. County of Sacramento, 151 Cal. App. 4th 1012, 60 Cal. Rptr. 3d 202 \(3d Dist. 2007\).](#)

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[[FN4](#)] [State ex rel. Redmond v. Smith, 207 Neb. 21, 295 N.W.2d 297 \(1980\).](#)

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[[FN5](#)] [Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 \(1952\).](#)

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## § 112. Death of incumbent or officer-elect

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

A vacancy in office may result from the death of the incumbent.[FN1]

Ordinarily, the death of an elected officer before qualifying for office does not create a vacancy in the office that can be filled by appointment or otherwise, and the incumbent continues in office until his or her successor is elected and qualified.[FN2] Thus, the death of a person before he or she has qualified according to law to fill an office to which he or she was elected does not create a vacancy, if the incumbent of the office is authorized to hold over until his or her successor has qualified.[FN3] The death of an officer-elect before he or she qualifies, however, causes a vacancy where the incumbent is not entitled to hold over.[FN4] Where one elected for an office dies after he or she has qualified and before the commencement of his or her term, a vacancy is created in the new term, which may be filled as provided by law.[FN5]

When an incumbent officer dies after his or her re-election, but before the expiration of his or her term, the officer appointed before the expiration of the term is entitled to serve until his or her successor is elected and qualified, and there is no vacancy at the expiration of the term to which another officer might be appointed.[FN6]

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[FN1] [Roberts v. State ex rel. Jackson County Bd. of Com'rs](#), 151 Ind. App. 83, 278 N.E.2d 285 (1972); [State ex inf. McKittrick v. Wilson](#), 350 Mo. 486, 166 S.W.2d 499, 143 A.L.R. 1465 (1942); [Grant and McNamee v. Payne](#), 60 Nev. 250, 107 P.2d 307, 132 A.L.R. 568 (1940).

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[FN2] [State ex rel. Wyrick v. Wright](#), 678 S.W.2d 61 (Tenn. 1984).

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[FN3] [Justice v. Campbell](#), 241 Ark. 802, 410 S.W.2d 601 (1967); [State ex rel. Foughty v. Friederich](#), 108 N.W.2d 681 (N.D. 1961).

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[FN4] [Burnett v. Brown](#), 194 Va. 103, 72 S.E.2d 394 (1952).

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[FN5] [McRae v. State ex rel. Hyche](#), 269 Ala. 241, 112 So. 2d 487, 75 A.L.R.2d 1270 (1959); [LaBorde v. McGrath](#), 116 Mont. 283, 149 P.2d 913 (1944).

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[FN6] [Bone v. Duclos](#), 94 Idaho 589, 494 P.2d 1033 (1972).

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**§ 113. Resignation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

An office is vacated when an office holder resigns the office,[[FN1](#)] or, more precisely, a resignation, when complete, creates a vacancy in the office, which the appointing power may fill.[[FN2](#)] In order to create a vacancy, the resignation must be valid, binding,[[FN3](#)] and final.[[FN4](#)] If acceptance of the resignation is necessary to perfect it,[[FN5](#)] a vacancy does not exist until the resignation is in fact accepted by the proper authority.[[FN6](#)]

Where a resignation once tendered is final and becomes effective when it is received by, or filed with, the officer authorized by law to fill the vacancy, the resignation creates a vacancy in the office when received, although the resignation is to become effective at a later date.[[FN7](#)]

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[[FN1](#)] [Nesbitt v. Apple](#), 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected without opinion, (Mar. 8, 1995).

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[[FN2](#)] [Grant and McNamee v. Payne](#), 60 Nev. 250, 107 P.2d 307, 132 A.L.R. 568 (1940).

- As to the resignation of an officer, generally, see [§ 152](#).

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[[FN3](#)] [DeLuca v. Rhode Island State Bd. of Elections](#), 119 R.I. 59, 376 A.2d 326 (1977).

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[[FN4](#)] [State ex rel. Munroe v. City of Poulsbo](#), 109 Wash. App. 672, 37 P.3d 319 (Div. 2 2002).

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[[FN5](#)] As to the acceptance of a resignation, generally, see [§ 155](#).

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[[FN6](#)] [Georgia v. Suruda](#), 154 N.J. Super. 439, 381 A.2d 821 (Law Div. 1977).

- Although a judge's resignation was not effective until after the qualifying period for the judge's seat, a vacancy occurred when the governor accepted the judge's resignation. [Advisory Opinion to Governor re Sheriff And Judicial Vacancies Due To Resignations](#), 928 So. 2d 1218 (Fla. 2006).

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[\[FN7\] Cole v. McGillicuddy, 21 Ill. App. 3d 645, 316 N.E.2d 109 \(1st Dist. 1974\).](#)

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## **§ 114. Abandonment of office**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#)

A public office may become vacant ipso facto by abandonment.[\[FN1\]](#) If the acts and statements of the public officer clearly indicate an absolute relinquishment of the office, a vacancy is created thereby without the necessity of a judicial determination.[\[FN2\]](#)

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[\[FN1\] State v. Green, 206 Ark. 361, 175 S.W.2d 575 \(1943\); State ex rel. Schaub v. City of Scottsbluff, 169 Neb. 525, 100 N.W.2d 202, 76 A.L.R.2d 1304 \(1960\); Vanderbach v. Hudson County Bd. of Taxation, 133 N.J.L. 126, 42 A.2d 848 \(N.J. Ct. Err. & App. 1945\).](#)

- As to the abandonment of an office, generally, see [§§ 159 et seq.](#)

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[\[FN2\] Walter v. Adams, 110 Cal. App. 2d 484, 243 P.2d 21 \(3d Dist. 1952\); Caudel v. Prewitt, 296 Ky. 848, 178 S.W.2d 22 \(1944\); State ex rel. Schaub v. City of Scottsbluff, 169 Neb. 525, 100 N.W.2d 202, 76 A.L.R.2d 1304 \(1960\).](#)

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## **§ 115. Failure to timely file oath; failure to assume duties of office or qualify**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

A vacancy of office may arise if an officer refuses or neglects to take or file an oath of office within the prescribed time.<sup>[FN1]</sup> If a person appointed to office fails to timely file his or her oath of office, in accordance with statutory requirements, the office is automatically vacant and may be filled by the proper appointive power.<sup>[FN2]</sup> No vacancy, however, is created by a public official's failure to file an oath as statutorily required, where the passage of a constitutional oath, which all public officers are required to take before entering upon their duties of office, has effected a repeal by substitution of the statutory oath.<sup>[FN3]</sup>

A vacancy of office also may occur if a person elected to public office fails to qualify and enter upon the duties of the office within a prescribed period of time.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Sharpe v. Eugene](#), 39 A.D.3d 777, 833 N.Y.S.2d 669 (2d Dep't 2007); [Foisy v. Conroy](#), 101 Wash. App. 36, 4 P.3d 140 (Div. 1 2000).

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<sup>[FN2]</sup> [Comins v. Delaware County](#), 66 A.D.2d 966, 412 N.Y.S.2d 428 (3d Dep't 1978).

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<sup>[FN3]</sup> [Hendrick v. Walters](#), 1993 OK 162, 865 P.2d 1232 (Okla. 1993).

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[\[FN4\] Nesbitt v. Apple, 1995 OK 20, 891 P.2d 1235 \(Okla. 1995\)](#), as corrected without opinion, (Mar. 8, 1995).

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## **§ 116. Violation of oath or eligibility requirements; failure to perform duties**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#)

A vacancy may result from a violation of one's oath of office[\[FN1\]](#) or the conviction of a crime involving such a violation.[\[FN2\]](#) An office, however, does not become vacant when a condition of ineligibility of the incumbent arises after he or she takes office, if he or she was eligible when he or she took office;[\[FN3\]](#) the subsequent ineligibility merely affords grounds for removal.[\[FN4\]](#)

In some jurisdictions, a court is not authorized by the state constitution or by any statute to declare an office vacant because of the temporary disability of an incumbent to perform all of the duties of that office.[\[FN5\]](#) In other jurisdictions, however, statutes have provided that an officer's failure to perform a ministerial duty will cause a forfeiture of the office, although the vacancy does not arise automatically on the officer's failure to perform the duty, but arises only upon the appointing executive's determination that the officer has failed, after a reasonable time, to comply with the provision, and that a forfeiture has resulted.[\[FN6\]](#)

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[\[FN1\] Gunning v. Codd, 65 A.D.2d 415, 411 N.Y.S.2d 280 \(1st Dep't 1978\)](#), judgment aff'd, [49 N.Y.2d 495, 427 N.Y.S.2d 209, 403 N.E.2d 1208 \(1980\)](#); [Callender v. District Court for Twentieth Judicial Dist., Ardmore,](#)

[Carter County, 1981 OK 16, 625 P.2d 627 \(Okla. 1981\).](#)

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[\[FN2\] § 117.](#)

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[\[FN3\] May v. Edwards, 258 Ark. 871, 529 S.W.2d 647 \(1975\).](#)

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[\[FN4\] § 172.](#)

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[\[FN5\] Violet v. Voccola, 497 A.2d 709 \(R.I. 1985\).](#)

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[\[FN6\] Opinion of the Justices, 352 A.2d 406 \(Del. 1976\).](#)

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V. Manner of Acquiring or Filling Public Office or Position; Vacancies in Office

C. Vacancies in Office

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b. Particular Circumstances Resulting in Vacancy

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**§ 117. Conviction of crime**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#)

**A.L.R. Library**

[What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139](#)

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732

A vacancy of office may arise upon an officer's conviction for a felony,[[FN1](#)] or for offenses involving a violation of the officer's official duties[[FN2](#)] or oath of office,[[FN3](#)] or misconduct or the commission of a misdemeanor in office.[[FN4](#)] In some jurisdictions, a public officer's conviction of a federal offense is a conviction that vacates the nonfederal public office held by such officer.[[FN5](#)]

**Practice Tip:** Where a statutory provision provides that every office becomes vacant upon a conviction of the incumbent of any felony, no distinction is drawn between a conviction under a plea of nolo contendere on the one hand, and a conviction under a plea of guilty, or an adjudication of guilt after a plea of not guilty, on the other.[[FN6](#)]

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[[FN1](#)] [State v. Norris](#), 879 So. 2d 557 (Ala. 2003); [Cumbest v. Commissioners of Election of Jackson County](#), 416 So. 2d 683 (Miss. 1982); [Paey v. Rodrigue](#), 119 N.H. 186, 400 A.2d 51 (1979); [Hughes v. Brown](#), 62 Ohio App. 3d 417, 575 N.E.2d 1186 (10th Dist. Franklin County 1989), cause dismissed, 60 Ohio St. 3d 715, 574 N.E.2d 1085 (1991); [Nida v. State ex rel. Oklahoma Public Employees Retirement System Bd. of Trustees](#), 2004 OK CIV APP 85, 99 P.3d 1224 (Div. 3 2004).

- As to what constitutes a conviction requiring the removal from public office, see §§ [191](#) to [194](#).

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[[FN2](#)] [Lubin v. Wilson](#), 232 Cal. App. 3d 1422, 284 Cal. Rptr. 70 (4th Dist. 1991).

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[[FN3](#)] [Feola v. Carroll](#), 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219 (2008).

- As to violation of one's oath of office as grounds for vacating one's office, generally, see § [116](#).

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[[FN4](#)] [Cumbest v. Commissioners of Election of Jackson County](#), 416 So. 2d 683 (Miss. 1982).

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[[FN5](#)] [Paey v. Rodrigue](#), 119 N.H. 186, 400 A.2d 51 (1979); [Briggs v. Board of County Com'rs of Muskogee County](#), 1950 OK 105, 202 Okla. 684, 217 P.2d 827, 20 A.L.R.2d 727 (1950).

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[[FN6](#)] [Potter v. Board of County Com'rs, Clark County](#), 92 Nev. 153, 547 P.2d 681 (1976).

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**§ 118. Change of residence**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#)

When residence is a prerequisite to a given office,[[FN1](#)] a change of residence vacates that office,[[FN2](#)] absent a legislative expression to the contrary.[[FN3](#)] Some authority holds that although a change of residence may, of itself, automatically provide grounds for having an office declared vacated, the office is not vacated until a court or other authorized official or governing body declares it to be vacated.[[FN4](#)]

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[[FN1](#)] For discussion of residence as a requirement for eligibility for office, generally, see [§ 70](#).

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[[FN2](#)] [Brown v. Johnson](#), 362 Ill. App. 3d 413, 298 Ill. Dec. 311, 839 N.E.2d 634, 204 Ed. Law Rep. 707 (1st Dist. 2005); [Krajicek v. Gale](#), 267 Neb. 623, 677 N.W.2d 488 (2004).

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[[FN3](#)] [Dorf v. Skolnik](#), 280 Md. 101, 371 A.2d 1094 (1977).

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[[FN4](#)] [Williamson v. Village of Baskin](#), 339 So. 2d 474 (La. Ct. App. 2d Cir. 1976), writ denied, [341 So. 2d 1126](#) (La. 1977).

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**§ 119. Expiration of term and holding over**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 55(1)

Constitutional or statutory provisions generally provide that a public officer holds over on the expiration of his or her term of office until a successor is chosen and qualified,[[FN1](#)] and the purpose of such provisions is to prevent a temporary vacancy in a public office.[[FN2](#)] While it has been held that a vacancy may be said to occur when an officer's term expires, and the law itself fills the vacancy by providing that the incumbent will hold over,[[FN3](#)] the view is generally followed that, in the absence of some positive provision of the law necessitating a different conclusion, where the incumbent holds over at the expiration of a term, no vacancy results so as to authorize the appointing power to select a successor.[[FN4](#)] Under this view, where the tenure of an office is for a specified time and until a successor is qualified, the expiration of the time does not vacate the office.[[FN5](#)] Yet an office may become vacant once the appointing authority appoints an individual and he or she qualifies for the position, where an incumbent had been holding over in such position.[[FN6](#)]

Where no hold over provision has been enacted, a vacancy may exist at the expiration of a term, which may be filled by an appointment.[[FN7](#)] In this regard, if a specific term of office is provided by law, but no provision confers any right of tenure or preferential rights, an office becomes vacant upon expiration of the term.[[FN8](#)] There is also a vacancy where a statutory holdover provision is invalid and therefore ineffective because it conflicts with a constitutional provision for a flat term of years.[[FN9](#)]

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[[FN1](#)] § 147.

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[[FN2](#)] [Opinion of the Justices](#), 672 A.2d 4 (Del. 1995); [Stasch v. Weber](#), 188 Neb. 710, 199 N.W.2d 391 (1972).

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[[FN3](#)] [Roberts v. State ex rel. Jackson County Bd. of Com'rs](#), 151 Ind. App. 83, 278 N.E.2d 285 (1972).

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[[FN4](#)] [State ex rel. McCarthy v. Watson](#), 132 Conn. 518, 45 A.2d 716, 164 A.L.R. 1238 (1946); [Walker v. Hughes](#), 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 (1944); [City of Evansville v. Brown](#), 171 Ind. App. 284, 356 N.E.2d 691 (1976); [Denish v. Johnson](#), 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, 106 Ed. Law Rep. 1349 (1996); [Zemprelli v. Thornburgh](#), 55 Pa. Commw. 330, 423 A.2d 1072 (1980).

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[\[FN5\] Trost v. Tynatishon, 12 Ill. App. 3d 406, 299 N.E.2d 14 \(3d Dist. 1973\).](#)

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[\[FN6\] Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\).](#)

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[\[FN7\] Zemprelli v. Thornburgh, 55 Pa. Commw. 330, 423 A.2d 1072 \(1980\).](#)

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[\[FN8\] McCamant v. City and County of Denver, 31 Colo. App. 287, 501 P.2d 142 \(App 1972\).](#)

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[\[FN9\] Zemprelli v. Thornburgh, 55 Pa. Commw. 330, 423 A.2d 1072 \(1980\).](#)

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## § 120. Other circumstances

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [55\(1\)](#), [55\(2\)](#)

Under prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign, the first office.[\[FN1\]](#) A court may declare an office vacant where the office is filled in violation of a potential applicant's constitutional rights under the privileges and immunities clause or in violation of a merit selection process mandated by agency regulations.[\[FN2\]](#) Furthermore, state constitutional provisions restricting the holding of a political party

office by certain judges may be enforced, not by taking away the political office, but by creating a vacancy in the judicial office.[FN3]

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[FN1] § 61.

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[FN2] Jenkins v. McCollum, 446 F. Supp. 667 (N.D. Ala. 1978).

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[FN3] Barnes v. Durante, 75 Misc. 2d 881, 348 N.Y.S.2d 928 (Sup 1973).

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## Research References

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 36(1)

## Primary Authority

[U.S. Const. Art. VI, cl. 3](#)

[5 U.S.C.A. §§ 2903](#) to [2906](#), [3331](#) to [3333](#), [7311](#)

## **A.L.R. Library**

A.L.R. Index, Loyalty and Loyalty Oaths

A.L.R. Index, Public Officers and Employees

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## **Forms**

[Am. Jur. Legal Forms 2d § 210:13](#)

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### **§ 121. Generally**

#### **West's Key Number Digest**

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## **Forms**

[Am. Jur. Legal Forms 2d § 210:13](#) (Oath or affirmation of public employee)

A public officer, before beginning his or her official duties, may be required by constitutional or statutory provisions to take specific oaths or make specific affirmations.[FN1] Oath requirements traditionally are not considered qualifications for eligibility to office, but rather as requirements necessary to qualify to take office.[FN2] Some provisions require only those individuals who are actually elected or appointed to a public office to take an oath,[FN3] and particular officers may not be required to take and file such oaths.[FN4] When a public official takes an oath of office, swearing to uphold the laws of the state, that oath imposes upon him or her a specific duty not to obstruct or interfere with the execution of those laws.[FN5]

The refusal to take the required oath may work a forfeiture of the office.[FN6] Under the law of some states, a public officer must file an official oath within a specified time after the commencement of his or her term,[FN7] and if an officer fails to file an oath of office within the statutory time limit, a supervising board is not required to hold a hearing on charges before dismissing him or her.[FN8] Other authority holds that the absence of the filing of an oath does not prove that the oath was never taken, and failing to file an oath that has been taken does not deprive the official of his or her authority.[FN9]

Some constitutional oath provisions provide that in addition to the constitutionally required oath, the legislature may prescribe further oaths or affirmations.[FN10] Yet where the applicable constitutional oath contains a forfeiture clause providing that any person refusing to take such oath or affirmation will forfeit his or her office, and any person who has been convicted of having sworn or affirmed falsely or having violated such oath or affirmation will be disqualified from holding any office of trust or profit within the state, such clause refers solely to the failure to take the constitutional oath, and does not infer that the failure to take some statutory oath would similarly result in forfeiture of office.[FN11]

**Observation:** A public officer who, at the end of his or her term of office, is again chosen for the office must generally qualify for the new term by taking an oath of office.[FN12]

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[FN1] [Thomas v. Tademy](#), 982 So. 2d 213 (La. Ct. App. 4th Cir. 2008); [McCue v. Antisell](#), 105 N.J. Super. 128, 251 A.2d 308 (App. Div. 1969); [Nesbitt v. Apple](#), 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected without opinion, (Mar. 8, 1995); [Kerns v. Wolverton](#), 181 W. Va. 143, 381 S.E.2d 258 (1989).

- As to oaths and affirmations, generally, see [Am. Jur. 2d, Oath and Affirmation §§ 1 et seq.](#)

[FN2] [Reale v. Board of Real Estate Appraisers](#), 880 P.2d 1205 (Colo. 1994).

[FN3] [Stockton v. N.M. Taxation & Revenue Dept.](#), 141 N.M. 860, 2007-NMCA-071, 161 P.3d 905 (Ct. App. 2007).

[FN4] [Hedstrom v. Motor Vehicle Div., Dept. of Revenue](#), 662 P.2d 173 (Colo. 1983); [Manka v. Tipton](#), 805 P.2d 1203 (Colo. App 1991).

[FN5] [State v. Espejel](#), 867 So. 2d 863 (La. Ct. App. 2d Cir. 2004).

[FN6] [Nesbitt v. Apple](#), 1995 OK 20, 891 P.2d 1235 (Okla. 1995), as corrected without opinion, (Mar. 8, 1995).

[FN7] [Fanelli v. O'Rourke](#), 146 A.D.2d 771, 537 N.Y.S.2d 252 (2d Dep't 1989).

[FN8] [Comins v. Delaware County](#), 66 A.D.2d 966, 412 N.Y.S.2d 428 (3d Dep't 1978).

[FN9] [Thomas v. Burkhalter](#), 90 S.W.3d 425 (Tex. App. Amarillo 2002).

[\[FN10\] Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 \(Okla. 1993\).](#)

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[\[FN11\] Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 \(Okla. 1993\).](#)

- As to the forfeiture of a public office by conduct or circumstances after taking possession of such office, see [§§ 164 et seq.](#)

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[\[FN12\] Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 \(1944\).](#)

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A. Oath and Affirmation

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## **§ 122. Form and contents of oath and affirmations**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 36(1)

The United States Constitution provides that United States Senators and Representatives, the members of the several state legislatures, and all executive and judicial officers of both the United States and of the several states must be bound by an oath or affirmation to support the United States Constitution.[\[FN1\]](#)

As a rule, the officer is called upon to swear that he or she will support the Constitution of the United States and of the state, and that he or she will faithfully, or to the best of his or her judgment and ability, perform the duties of his or her office.[\[FN2\]](#) Statutes prescribing oaths requiring, among other things, that one swear to defend or uphold constitutional law, have withstood challenges that they were unconstitutionally vague.[\[FN3\]](#)

A statutory oath requirement is unconstitutional if it conflicts with the oath of office prescribed by a constitution, which is deemed exclusive.[\[FN4\]](#) A statutory oath, however, need not parrot the exact language of the constitutionally required oath to be constitutionally proper.[\[FN5\]](#)

**Observation:** Where the passage of a constitutional oath which all public officers are required to take before entering upon their duties of office has been held to effect a repeal by substitution on a statutory oath, no public official is required to take an oath in the form required by the statute to qualify for office.[FN6]

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[FN1] [U.S. Const. Art. VI, cl. 3.](#)

- The requirement of the United States Constitution that members of a legislature be bound by oath to support it does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator swears to uphold the Constitution. [Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 \(1966\).](#)

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[FN2] [Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 2d 418 \(1971\); Hedstrom v. Motor Vehicle Div., Dept. of Revenue, 662 P.2d 173 \(Colo. 1983\); Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 \(Okla. 1993\).](#)

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[FN3] [Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 \(1972\).](#)

- Village council's mandatory oath of office, requiring council members to swear to support the governments of the United States and the state, was not unconstitutionally vague. [Dalack v. Village of Tequesta, Florida, 434 F. Supp. 2d 1336 \(S.D. Fla. 2006\)](#), aff'd, [223 Fed. Appx. 885 \(11th Cir. 2007\)](#), cert. denied, [128 S. Ct. 1871, 170 L. Ed. 2d 751 \(2008\).](#)

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[FN4] [Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 \(1961\); Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241 \(1950\).](#)

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[FN5] [Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 \(1966\); Ohlson v. Phillips, 304 F. Supp. 1152 \(D. Colo. 1969\)](#), judgment aff'd, [397 U.S. 317, 90 S. Ct. 1124, 25 L. Ed. 2d 337 \(1970\).](#)

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[FN6] [Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 \(Okla. 1993\).](#)

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## VI. Technical Prerequisites to Entering Public Office or Employment

### A. Oath and Affirmation

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#### § 123. Form and contents of oath and affirmations—Federal statutory requirements

##### West's Key Number Digest

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An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services of the United States, must take an oath as specified by statute, requiring in part that the individual will support and defend the Constitution of the United States, and faithfully discharge the duties of the office.[FN1] An officer, within 30 days after the effective date of his or her appointment, must file with the oath of office so required, an affidavit that neither he or she nor anyone acting in his or her behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.[FN2]

With specified exceptions, an individual who accepts an office or employment in the government of the United States or in the government of the District of Columbia must execute an affidavit within a specified time after accepting the office or employment that his or her acceptance and holding of the office or employment does not or will not violate a statute[FN3] prohibiting one from accepting or holding a position in the government of the United States or the District of Columbia if he or she: (1) advocates the overthrow of our constitutional form of government; (2) is a member of an organization that he or she knows advocates the overthrow of our constitutional form of government; (3) participates in a strike, or asserts the right to strike against the government of the United States or of the District of Columbia; or (4) is a member of an organization of employees of the government of the United States or of individuals employed by the government of the District of Columbia that he or she knows asserts the right to strike against the governments of the United States or of the District of Columbia.[FN4] The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate the applicable statute.[FN5] An affidavit is not required from an individual employed by the government of the United States or of the District of Columbia for less than 60 days for sudden emergency work involving the loss of human life or the destruction of property.[FN6]

An employee of an executive agency or an individual employed by the government of the District of Columbia who, on original appointment, subscribed to the oath of office required by federal statute[FN7] is not required to renew the oath because of a change in status, so long as his or her service is continuous in the agency in which he or she is employed, unless, in the opinion of the head of the executive agency, the Secretary of a military department with respect to an employee of his or her department, or the Commissioners of the District of Columbia, the public interest so requires.[FN8] An individual who, on appointment as an employee of a House of Congress, subscribed to the oath of office required is not required to renew the oath so long as his or her service as an employee of that House of Congress is continuous.[FN9] The oath of office taken by an individual under the applicable statute[FN10] must be delivered by him or her to, and preserved by, the House of Congress, agency, or court to which the office pertains.[FN11]

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[FN1] 5 U.S.C.A. § 3331.

- As to persons who may administer the required oath, see 5 U.S.C.A. § 2903.

- As to an employee of an executive agency who is authorized to administer the required oath not being able to charge or receive a fee or pay for administering such, see 5 U.S.C.A. § 2904.

- As to civil service laws, generally, see [Am. Jur. 2d, Civil Service §§ 1 et seq.](#)



[\[FN2\] 5 U.S.C.A. § 3332.](#)

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[\[FN3\] 5 U.S.C.A. § 7311.](#)

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[\[FN4\] 5 U.S.C.A. § 3333\(a\).](#)

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[\[FN5\] 5 U.S.C.A. § 3333\(a\)](#) (referring to [5 U.S.C.A. § 7311](#)).

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[\[FN6\] 5 U.S.C.A. § 3333\(b\).](#)

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[\[FN7\] 5 U.S.C.A. § 3331.](#)

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[\[FN8\] 5 U.S.C.A. § 2905\(a\).](#)

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[\[FN9\] 5 U.S.C.A. § 2905\(b\).](#)

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[\[FN10\] 5 U.S.C.A. § 3331.](#)

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[\[FN11\] 5 U.S.C.A. § 2906.](#)

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**§ 124. Prohibited oath requirements**

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## A.L.R. Library

### [Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268](#)

Neither federal nor state governments may condition employment on the taking of oaths that impinge on rights guaranteed by the First and 14th Amendments,[[FN1](#)] such as those relating to political beliefs.[[FN2](#)] Thus, government employment may not be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as criticizing institutions of government,[[FN3](#)] discussing political doctrine that opposes the overthrow of certain forms of government,[[FN4](#)] and supporting candidates for political office.[[FN5](#)] No state interest can justify a requirement that a public employee falsely swear allegiance to an offensive religious or political faith, or a requirement that he or she actively work for, or speak out in favor of, a political cause he or she deems obnoxious.[[FN6](#)]

Government employment may not be conditioned on an oath denying past, or abjuring future, associational activities with constitutional protection, and such protected activities include membership in an organization having illegal purposes, unless one knows of, and has a specific intent to promote, the illegal purpose.[[FN7](#)] Loyalty oath statutes requiring a public officer or employee to swear to nonmembership in subversive organizations,[[FN8](#)] or past and present nonmembership in organizations known to be advocating the overthrow of the government,[[FN9](#)] without requiring knowledge of,[[FN10](#)] and an intent[[FN11](#)] or specific intent,[[FN12](#)] to further the organization's unlawful aims have been held unconstitutional, as a violation of due process,[[FN13](#)] as unconstitutionally vague,[[FN14](#)] overbroad,[[FN15](#)] or as infringing rights under the First and 14th Amendments.[[FN16](#)] A statute requiring a candidate for election to public office to file a statement under oath that he or she is not a subversive person does not violate constitutional provisions, where the definition of subversive person includes the knowledge and intent requirement.[[FN17](#)]

A portion of a loyalty oath, requiring an applicant for state public employment to swear or affirm that he or she does not believe in the overthrow of the state or federal government by force or violence, is constitutionally invalid where it results in the summary dismissal from public employment of an employee who refuses to subscribe to the oath without a hearing or inquiry required by due process.[[FN18](#)]

A provision requiring all state employees to take an oath indicating that the oath taker is a citizen of the state and of the United States is unconstitutional, since citizenship cannot be a prerequisite to taking a loyalty oath given to all employees and officers of the state, and an alien who is otherwise eligible for public employment cannot be precluded from such employment due to such wording of an oath.[[FN19](#)]

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[[FN1](#)] [Cole v. Richardson](#), 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

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[[FN2](#)] [Cole v. Richardson](#), 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

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[[FN3](#)] [Keyishian v. Board of Regents of University of State of N. Y.](#), 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

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[[FN4](#)] [Baggett v. Bullitt](#), 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

- Government cannot condition employment or elective office on taking an oath requiring the denial of past or future advocacy of political doctrine. [Dalack v. Village of Tequesta, Florida](#), 434 F. Supp. 2d 1336 (S.D. Fla. 2006), aff'd, 223 Fed. Appx. 885 (11th Cir. 2007), cert. denied, 128 S. Ct. 1871, 170 L. Ed. 2d 751 (2008).

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[\[FN5\] Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 \(1972\); Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 \(1961\).](#)

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[\[FN6\] Illinois State Employees Union, Council 34, Am. Federation of State, County and Municipal Employees, AFL-CIO v. Lewis, 473 F.2d 561 \(7th Cir. 1972\).](#)

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[\[FN7\] Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 \(1972\).](#)

- Government cannot condition employment or elective office on taking an oath requiring the denial of past or future associational activity. [Dalack v. Village of Tequesta, Florida, 434 F. Supp. 2d 1336 \(S.D. Fla. 2006\)](#), [aff'd, 223 Fed. Appx. 885 \(11th Cir. 2007\)](#), cert. denied, [128 S. Ct. 1871, 170 L. Ed. 2d 751 \(2008\)](#).

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[\[FN8\] Haskett v. Washington, 294 F. Supp. 912 \(D. D.C. 1968\).](#)

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[\[FN9\] Vogel v. Los Angeles County, 68 Cal. 2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 \(1967\).](#)

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[\[FN10\] Haskett v. Washington, 294 F. Supp. 912 \(D. D.C. 1968\).](#)

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[\[FN11\] Haskett v. Washington, 294 F. Supp. 912 \(D. D.C. 1968\).](#)

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[\[FN12\] Ehrenreich v. Londerholm, 273 F. Supp. 178 \(D. Kan. 1967\); Vogel v. Los Angeles County, 68 Cal. 2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 \(1967\).](#)

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[\[FN13\] Heckler v. Shepard, 243 F. Supp. 841 \(D. Idaho 1965\).](#)

- A public employee's oath of past and present nonmembership in organizations listed on the attorney general's list as a communist front or subversive, but without a scienter provision, was invalid as violating the due process clause. [Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 \(1952\).](#)

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[\[FN14\] Opinion of the Justices, 108 N.H. 62, 228 A.2d 165 \(1967\).](#)

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[\[FN15\] Haskett v. Washington, 294 F. Supp. 912 \(D. D.C. 1968\).](#)

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[\[FN16\] Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 \(1966\); Gilmore v. James, 274 F. Supp. 75, 11 Fed. R. Serv. 2d 501 \(N.D. Tex. 1967\), judgment aff'd, 389 U.S. 572, 88 S. Ct. 695, 19 L. Ed. 2d 783 \(1968\); Vogel v. Los Angeles County, 68 Cal. 2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 \(1967\).](#)

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[\[FN17\] Lisker v. Kelley, 315 F. Supp. 777 \(M.D. Pa. 1970\), judgment aff'd, 401 U.S. 928, 91 S. Ct. 927, 28 L. Ed. 2d 210 \(1971\).](#)

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[\[FN18\] Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 2d 418 \(1971\).](#)

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[\[FN19\] City of Orlando v. State of Fla., 751 F. Supp. 974 \(M.D. Fla. 1990\).](#)

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### **Primary Authority**

[5 U.S.C.A. §§ 2901, 2902](#)

### **A.L.R. Library**

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§ 125. Generally

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 38

A commission, which may be defined as a written authority from a competent source given to an officer as his or her warrant for the exercise of the powers and duties of the office to which he or she is commissioned,[[FN1](#)] is usually evidence of the appointment of an officer.[[FN2](#)] In some jurisdictions, the issuance of a commission is not essential to the validity of an office.[[FN3](#)]

**Observation:** There is a distinction between commissions issued by the appointing power and those issued by some other officer or body, in that a commission issued by the appointing power seems to be essential to the completion of the appointment, while a commission issued by some other officer or body constitutes no part of the appointing power.[[FN4](#)]

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[[FN1](#)] [State v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583 \(1927\).](#)

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[[FN2](#)] [Slaughter v. Dickinson, 226 So. 2d 97 \(Fla. 1969\); State ex rel. Tobias v. Seitz, 161 Ohio St. 269, 53 Ohio Op. 145, 119 N.E.2d 47 \(1954\).](#)

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[[FN3](#)] [Slaughter v. Dickinson, 226 So. 2d 97 \(Fla. 1969\).](#)

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[[FN4](#)] [State ex rel. Jones v. Steele, 263 Ala. 16, 81 So. 2d 542 \(1955\).](#)

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**§ 126. Federal officers**

**West's Key Number Digest**

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The President is authorized to commission officers of the United States.[FN1] In this regard, by statute, the President may make out and deliver, after adjournment of the Senate, the commission of an officer whose appointment has been confirmed by the Senate.[FN2]

With specified exceptions, the Secretary of State must make out and record, and affix the seal of the United States to, the commission of an officer appointed by the President.[FN3] The seal of the United States may not be affixed to the commission before the commission has been signed by the President.[FN4]

The commission of an officer in the civil service or uniformed services under the control of the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Defense, the Secretary of a military department, the Secretary of the Interior, the Secretary of Homeland Security, or the Secretary of the Treasury must be made out and recorded in the department in which he or she is to serve under the seal of that department.[FN5] The departmental seal may not be affixed to the commission before the commission has been signed by the President.[FN6]

The commission of judicial officers and United States attorneys and marshals, appointed by the President, by and with the advice and consent of the Senate, and other commissions which before August 8, 1888, were prepared at the Department of State on the requisition of the Attorney General, must be made out and recorded in the Department of Justice under the seal of that department and countersigned by the Attorney General.[FN7] The department seal may not be affixed to the commission before the commission has been signed by the President.[FN8]

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[FN1] [U.S. v. Smith, 286 U.S. 6, 52 S. Ct. 475, 76 L. Ed. 954 \(1932\).](#)

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[FN2] [5 U.S.C.A. § 2901.](#)

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[FN3] [5 U.S.C.A. § 2902\(a\).](#)

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[\[FN4\] 5 U.S.C.A. § 2902\(a\).](#)

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[\[FN5\] 5 U.S.C.A. § 2902\(b\).](#)

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[\[FN6\] 5 U.S.C.A. § 2902\(b\).](#)

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[\[FN7\] 5 U.S.C.A. § 2902\(c\).](#)

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[\[FN8\] 5 U.S.C.A. § 2902\(c\).](#)

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[31 U.S.C.A. § 9302](#)

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### § 127. Generally

#### West's Key Number Digest

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Public officers may be required to give a bond for the performance of their official duties,[\[FN1\]](#) even when re-elected or reappointed to succeed themselves.[\[FN2\]](#) There is, however, a statutory prohibition against requiring or obtaining surety bonds for officers or employees of the United States government in carrying out their official duties.[\[FN3\]](#) Bond requirements traditionally are not considered qualifications for eligibility to office, but rather requirements necessary to qualify to take office.[\[FN4\]](#)

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[\[FN1\]](#) [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 \(C.C.A. 8th Cir. 1931\); Kansas Amusement Co. v. Eddy, 143 Kan. 988, 57 P.2d 458, 105 A.L.R.](#)



[702 \(1936\).](#)

- As to actions on official bonds, see [§§ 483 et seq.](#)

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[FN2] [Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 \(1944\).](#)

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[FN3] [31 U.S.C.A. § 9302.](#)

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[FN4] [Reale v. Board of Real Estate Appraisers, 880 P.2d 1205 \(Colo. 1994\).](#)

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## § 128. Nature of bond

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [37](#)

The bond of a public officer is in the nature of an indemnity bond rather than a penal or forfeiture bond.[FN1] It is, in effect, a contract between the officer and the government, binding the officer to discharge the duties of his or her office.[FN2] The bond is also an obligation binding the sureties to make good the officer's defaults.[FN3] Official bonds are required not for the benefit of the office holder, but for the protection of the entire citizenship,[FN4] and are designed to indemnify those suffering loss or injury by reason of misconduct or neglect in office.[FN5]

While some cases hold that a public officer's official bond creates a primary contractual obligation between the injured party and the officer and surety,[FN6] other cases hold that the official bond is merely collateral

security for the performance of the officer's duty.[FN7] In any case, official bonds are treated differently than private bonds.[FN8] Thus, for example, while parties to a private bond may contractually limit the time in which suit may be brought on the bond to a period less than the applicable statute of limitations,[FN9] public officials do not have the power to contract away the rights of the public for whose benefit the official bond is required.[FN10]

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[FN1] State ex rel. Switzer v. Overturff, 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343 (1948); City of Springfield v. Brown, 365 Mo. 854, 289 S.W.2d 48 (1956); Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 (1963).

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[FN2] Motley v. Callaway County, 347 Mo. 1018, 149 S.W.2d 875 (1941); Chappell v. Fidelity & Deposit Co. of Maryland, 194 S.C. 124, 9 S.E.2d 592 (1940).

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[FN3] § 345.

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[FN4] Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936).

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[FN5] City of Springfield v. Brown, 365 Mo. 854, 289 S.W.2d 48 (1956).

- The purpose of official bonds is to provide assurance, through joint and several liability, to the public in the event a public official does not fulfill the duties and obligations required of his or her position. County of Hudson v. Janiszewski, 520 F. Supp. 2d 631 (D.N.J. 2007), as amended, (Nov. 5, 2007).

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[FN6] Washburn v. Foster, 87 Ga. App. 132, 73 S.E.2d 240 (1952); National Surety Co. of New York v. Hester's Adm'r, 241 Ky. 623, 44 S.W.2d 563 (1931); Village of Herkimer v. American Sur. Co. of New York, 18 A.D.2d 94, 238 N.Y.S.2d 290 (4th Dep't 1963); Com., for Use of Fayette County, v. Perry, 330 Pa. 355, 199 A. 204 (1938); Maxwell v. Stack, 246 Wis. 487, 17 N.W.2d 603 (1945).

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[FN7] Oakes v. American Surety Co. of New York, 58 Idaho 482, 76 P.2d 932 (1938); Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 (1st Dist. 1945); Motley v. Callaway County, 347 Mo. 1018, 149 S.W.2d 875 (1941); Pierce County v. Newman, 26 Wash. 2d 63, 173 P.2d 127 (1946).

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[FN8] State v. Lidster, 467 N.E.2d 47 (Ind. Ct. App. 1984).

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[FN9] Am. Jur. 2d, Bonds § 32.

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[FN10] State v. Lidster, 467 N.E.2d 47 (Ind. Ct. App. 1984).

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**§ 129. Common-law bonds**

**West's Key Number Digest**

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Although a particular bond given by an officer may be different from the required statutory bond, it may be enforceable as a common-law obligation,<sup>[FN1]</sup> since the interests of the public justify the enforcement of a common-law bond when it has been substituted for a statutory bond.<sup>[FN2]</sup> Such a bond may also be construed as including the terms required by the applicable statute.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 \(1936\).](#)

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<sup>[FN2]</sup> [Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 \(1936\).](#)

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<sup>[FN3]</sup> [§ 131.](#)

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**§ 130. Construction and validity**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 37

A bond of a public officer is to be construed in accordance with the rules governing the construction of bonds generally,[[FN1](#)] and should be construed to accomplish what the law requires of it.[[FN2](#)] A statute providing for the giving of a bond by a public officer, and a bond given pursuant to such statute should, in case of doubt, be given such interpretation as will preserve the public funds.[[FN3](#)] Thus, provisions in official bonds which tend to limit or restrict the surety's liability are void.[[FN4](#)]

Bonds guaranteeing the fidelity of officers and employees, if written for profit and in the course of business undertaken therefor, are essentially insurance contracts and will be construed as such.[[FN5](#)] The language of the bond is to be strictly construed against the surety, although the entire contract is to be construed together for the purpose of giving force and effect to each clause.[[FN6](#)] Ambiguities in the wording of an official bond are resolved against the party which drafts it, normally the surety.[[FN7](#)]

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[[FN1](#)] As to the construction of bonds, generally, see [Am. Jur. 2d, Bonds §§ 20 et seq.](#)

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[[FN2](#)] [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn.](#), 53 F.2d 178, 81 A.L.R. 1 (C.C.A. 8th Cir. 1931); [Holland v. American Sur. Co. of New York](#), 149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451 (1942).

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[[FN3](#)] [Holland v. American Sur. Co. of New York](#), 149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451 (1942).

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[[FN4](#)] [State v. Lidster](#), 467 N.E.2d 47 (Ind. Ct. App. 1984).

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[[FN5](#)] [Town of Troy v. American Fidelity Co.](#), 120 Vt. 410, 143 A.2d 469 (1958); [American Surety Co. of New York v. Commonwealth](#), 180 Va. 97, 21 S.E.2d 748 (1942).

- As to the construction of insurance contracts, generally, see [Am. Jur. 2d, Insurance §§ 291 et seq.](#)

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[[FN6](#)] [Town of Troy v. American Fidelity Co.](#), 120 Vt. 410, 143 A.2d 469 (1958).

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[[FN7](#)] [Town of Scotland Neck v. Western Sur. Co.](#), 301 N.C. 331, 271 S.E.2d 501 (1980); [Town of Troy v. American Fidelity Co.](#), 120 Vt. 410, 143 A.2d 469 (1958).

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**§ 131. Construction and validity—Effect of statutory requirements**

**West's Key Number Digest**

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All of the provisions of the statute upon which an official bond rests and to which it relates are deemed to be written into the bond,[[FN1](#)] and as becoming a part of the bond to the same extent as though incorporated in the instrument, regardless of the intention of the parties.[[FN2](#)] Yet, this has been held not to be the case where the bond is not a statutory public officer's performance bond, but rather a contract of indemnity, in the nature of a fidelity bond.[[FN3](#)] Even so, ordinarily, the obligations of both the principal and the sureties on official bonds are controlled by the statutory language.[[FN4](#)] Thus, words relating to the officer's duty which are by statute prescribed to be included as part of the condition of his or her bond, but which have been omitted from the bond, will be regarded as having been intended to be included, so as to justify reading them in for the purpose of determining liability, even though the omitted words are not of a cumulative nature.[[FN5](#)]

If contractual provisions and limitations in contravention of the statutory requirements are inserted in an official bond, they are not enforceable, even as a common-law bond.[[FN6](#)] The fact, however, that an official bond differs in some respect from the requirements of the statute, or contains limitations not authorized by statute, does not necessarily render it invalid, since where the added conditions and provisions can be separated from the statutory ones, a good and enforceable bond may remain, and the rest can be treated as surplusage.[[FN7](#)]

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[[FN1](#)] [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn.](#), 53 F.2d 178, 81 A.L.R. 1 (C.C.A. 8th Cir. 1931); [Dogarin v. Connor](#), 6 Ariz. App. 473, 433 P.2d 653 (1967); [Jones v. Hadfield](#), 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936); [Holland v. American Sur. Co. of New York](#),

[149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451 \(1942\)](#); [State ex rel. Switzer v. Overturff, 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343 \(1948\)](#); [State v. Moody, 198 So. 2d 586 \(Miss. 1967\)](#); [Grimes v. Bosque County, 240 S.W.2d 511 \(Tex. Civ. App. Waco 1951\)](#), writ refused n.r.e.

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[FN2] [Grimes v. Bosque County, 240 S.W.2d 511 \(Tex. Civ. App. Waco 1951\)](#), writ refused n.r.e.

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[FN3] [Langley v. Patrick, 238 N.C. 250, 77 S.E.2d 656 \(1953\)](#).

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[FN4] [Dogarin v. Connor, 6 Ariz. App. 473, 433 P.2d 653 \(1967\)](#).

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[FN5] [Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 \(1936\)](#).

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[FN6] [Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 \(1936\)](#).

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[FN7] [Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 \(1936\)](#).

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C. Official Bond

2. Requirements of Bond and Execution of Bond

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**§ 132. Generally**

**West's Key Number Digest**

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A bond of a public officer should be executed in conformity with whatever statutory provisions there may be governing the matter,[FN1] and should be signed.[FN2] While the bond should substantially comply with whatever statutory or ordinance requirements there may be as to its form, terms, and conditions,[FN3] unless the applicable statute provides that a bond not executed in the form prescribed will be void, a substantial compliance with the statutory requirements is generally sufficient.[FN4]

Bonds, generally, must be supported by a sufficient consideration.[FN5]

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[FN1] [Jones v. Hadfield](#), 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936).

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[FN2] [§ 133](#).

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[FN3] [Jones v. Hadfield](#), 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936); [Town of Scotland Neck v. Western Sur. Co.](#), 301 N.C. 331, 271 S.E.2d 501 (1980).

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[FN4] [Linz v. Eastland County](#), 39 S.W.2d 599, 77 A.L.R. 1466 (Tex. Comm'n App. 1931).

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[FN5] [Am. Jur. 2d, Bonds § 10](#).

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VI. Technical Prerequisites to Entering Public Office or Employment

C. Official Bond

2. Requirements of Bond and Execution of Bond

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**§ 133. Signature of officer**

**West's Key Number Digest**

The general requirement that every bond must be signed by the principal[[FN1](#)] applies to bonds required of public officials.[[FN2](#)]

There is a difference of opinion as to the binding effect of an official bond not signed by the officer. Some decisions affirm the binding obligation upon the sureties of official bonds lacking the signature of the principal obligor.[[FN3](#)] In other cases, the sureties on an official bond not signed by the principal have been declared not bound, because the bond was joint, and not joint and several.[[FN4](#)] In this regard, if the bond is joint, the signature of the officer is essential to its validity, and without his or her signature it has no binding force on the sureties,[[FN5](#)] while a joint and several bond will bind the sureties without his or her signature.[[FN6](#)]

Sureties executing an official bond which is not signed by their principal may, by their conduct, be estopped to deny their liability on such bond.[[FN7](#)]

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[[FN1](#)] As to the necessity of the signature of the principal to a bond, generally, see [Am. Jur. 2d, Bonds § 13](#).

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[[FN2](#)] [In re Guardianship of Hampton](#), 359 N.W.2d 740 (Minn. Ct. App. 1984), decision aff'd in part, rev'd in part on other grounds, [374 N.W.2d 264 \(Minn. 1985\)](#).

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[[FN3](#)] [Whitlock v. Wood](#), 193 Ark. 695, 101 S.W.2d 950, 110 A.L.R. 955 (1937).

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[[FN4](#)] [Berlin Tp., Monroe County v. Neidermeier](#), 281 Mich. 450, 275 N.W. 204 (1937).

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[[FN5](#)] [Berlin Tp., Monroe County v. Neidermeier](#), 281 Mich. 450, 275 N.W. 204 (1937).

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[[FN6](#)] [Village of Hampton v. Gausman](#), 136 Neb. 550, 286 N.W. 757 (1939).

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[[FN7](#)] [§ 359](#).

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VI. Technical Prerequisites to Entering Public Office or Employment  
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2. Requirements of Bond and Execution of Bond

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**§ 134. Delivery, approval, and acceptance**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 37

As a rule, both delivery and acceptance are essential to the validity of a bond which takes effect from the date of delivery.<sup>[FN1]</sup> Statutes providing for the approval of official bonds have been said to be directory and not mandatory, so that the failure of an officer or a court to approve an official bond as required by statute does not affect its validity,<sup>[FN2]</sup> unless the statute specifically provides that the officer may not discharge the duties of his or her office until the official bond has been approved.<sup>[FN3]</sup> Thus, the failure of the proper officers to approve an official bond, or its approval by a person different from the one whose duty it is to approve it, may not invalidate the bond or release the sureties from their liability.<sup>[FN4]</sup> If an official bond is executed and delivered to the proper representative of the government, it becomes obligatory upon the parties signing it unless it is disapproved by such representative.<sup>[FN5]</sup>

An acceptance or approval of an official bond should be made in the manner prescribed by statute. It may be in writing, but unless the statute requires a writing, it may be verbal.<sup>[FN6]</sup> An implication of approval and acceptance may arise from the facts and circumstances. Thus, when an officer whose duty it is to approve a bond accepts the bond for filing places on such bond his or her filing stamp and records it in his or her office, it is presumed, in the absence of competent evidence to the contrary, that such officer approved the bond.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Bonds § 14.](#)

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<sup>[FN2]</sup> [State ex rel. Jones v. Farrar, 146 Ohio St. 467, 32 Ohio Op. 542, 66 N.E.2d 531 \(1946\); Linz v. Eastland County, 39 S.W.2d 599, 77 A.L.R. 1466 \(Tex. Comm'n App. 1931\); American Surety Co. of New York v. Commonwealth, 180 Va. 97, 21 S.E.2d 748 \(1942\).](#)

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<sup>[FN3]</sup> [Linz v. Eastland County, 39 S.W.2d 599, 77 A.L.R. 1466 \(Tex. Comm'n App. 1931\).](#)

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<sup>[FN4]</sup> [Linz v. Eastland County, 39 S.W.2d 599, 77 A.L.R. 1466 \(Tex. Comm'n App. 1931\).](#)

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<sup>[FN5]</sup> [Prucka v. Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N.W.2d 761 \(1953\).](#)

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<sup>[FN6]</sup> [Prucka v. Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N.W.2d 761 \(1953\).](#)

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<sup>[FN7]</sup> [Prucka v. Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N.W.2d 761 \(1953\).](#)

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### **West's Key Number Digest**

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### **A.L.R. Library**

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## **Forms**

[Am. Jur. Legal Forms 2d § 210:22](#)

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**§ 135. Definitions and distinctions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 50, 60

There is a distinction between the words "term" and "tenure" as applied to a public officer or employee.[FN1] The "term," as applied to an office, refers to a fixed and definite period of time.[FN2] That is, the "term" is the fixed period of time an appointee is authorized to serve in office, a period that is established by law and specified in the letter of appointment.[FN3]

The word "tenure" has a more extended meaning than the word "term,"[FN4] and tenure of an office means the manner in which the office is held, especially with regard to time.[FN5] "Tenure" generally is the time the appointee actually serves in office.[FN6] The tenure of the person holding an office may vary from the term of the office,[FN7] and, depending on the circumstances, the tenure can be shorter or longer than the officer's term.[FN8]

The term of an office is not affected by a shortening of the officer's tenure.[FN9]

**Observation:** An "indefinite term" is, by definition, one not circumscribed by a definite number of years.[FN10]

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[FN1] *Smyers v. City of Albuquerque*, 140 N.M. 198, 2006-NMCA-095, 141 P.3d 542 (Ct. App. 2006); *State ex rel. Spaeth v. Olson ex rel. Sinner*, 359 N.W.2d 876 (N.D. 1985); *Selway v. Schultz*, 268 N.W.2d 149 (S.D. 1978); *State ex rel. Rushford v. Meador*, 165 W. Va. 48, 267 S.E.2d 169 (1980).

[FN2] *Collison v. State ex rel. Green*, 39 Del. 460, 2 A.2d 97, 119 A.L.R. 1422 (1938); *State ex rel. Racicot v. District Court of First Judicial Dist. In and For County of Lewis and Clark*, 243 Mont. 379, 794 P.2d 1180 (1990); *State ex rel. Spaeth v. Olson ex rel. Sinner*, 359 N.W.2d 876 (N.D. 1985); *State ex rel. Rushford v. Meador*, 165 W. Va. 48, 267 S.E.2d 169 (1980).

[\[FN3\] Smyers v. City of Albuquerque, 140 N.M. 198, 2006-NMCA-095, 141 P.3d 542 \(Ct. App. 2006\).](#)

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[\[FN4\] Kluth v. Andrus, 91 Ohio App. 1, 48 Ohio Op. 214, 60 Ohio L. Abs. 278, 101 N.E.2d 310 \(8th Dist. Cuyahoga County 1951\), judgment aff'd, 157 Ohio St. 279, 47 Ohio Op. 171, 105 N.E.2d 579 \(1952\).](#)

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[\[FN5\] Winterberg v. University of Nevada System, 89 Nev. 358, 513 P.2d 1248 \(1973\).](#)

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[\[FN6\] State ex rel. Racicot v. District Court of First Judicial Dist. In and For County of Lewis and Clark, 243 Mont. 379, 794 P.2d 1180 \(1990\); Smyers v. City of Albuquerque, 140 N.M. 198, 2006-NMCA-095, 141 P.3d 542 \(Ct. App. 2006\).](#)

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[\[FN7\] State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876 \(N.D. 1985\).](#)

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[\[FN8\] Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, 106 Ed. Law Rep. 1349 \(1996\).](#)

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[\[FN9\] State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876 \(N.D. 1985\).](#)

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[\[FN10\] Butler v. Amato, 224 N.J. Super. 124, 539 A.2d 1241 \(App. Div. 1988\).](#)

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**§ 136. Right to continued employment**

**West's Key Number Digest**

A public employee generally does not hold his or her office ex contractu,[[FN1](#)] and insofar as the duration of public employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law.[[FN2](#)]

The commonplace legal maxim that no one has a right to continued public employment is subject to exception, the most noteworthy being federal constitutional due process claims which depend on having a state-recognized property right in continued employment.[[FN3](#)] Thus, there is authority for the view that one may have a property right in public employment if he or she has an enforceable expectation of continued employment or some form of guarantee,[[FN4](#)] and in some jurisdictions, the right to continued public employment constitutes a substantive right that cannot be eliminated by subsequent legislative action.[[FN5](#)] Furthermore, a property interest in continued employment may be established, by contract or by proof of an objectively reasonable expectation of continued employment,[[FN6](#)] and legitimate expectations of continued public employment may arise from statutes,[[FN7](#)] ordinances,[[FN8](#)] regulations,[[FN9](#)] contracts,[[FN10](#)] or the conduct or policy of the employer.[[FN11](#)]

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[\[FN1\] § 11.](#)

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[\[FN2\] Shoemaker v. Myers, 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054, 20 A.L.R.5th 1016 \(1990\).](#)

- A public employee generally serves at the pleasure of his or her employer and thus has no legitimate entitlement to continued employment. [Alba v. Housing Authority of City of Pittston, 400 F. Supp. 2d 685 \(M.D. Pa. 2005\).](#)

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[\[FN3\] Indiana State Prison and State Employees Appeals Com'n v. Van Ulzen, 582 N.E.2d 789, 71 Ed. Law Rep. 550 \(Ind. 1991\).](#)

- A state employee, who is classified as a permanent status employee and can be dismissed only for cause, has a constitutionally protected property interest in continued employment that entitles him or her to due process before he or she can be terminated. [Carlson v. Arizona State Personnel Bd., 214 Ariz. 426, 153 P.3d 1055 \(Ct. App. Div. 1 2007\).](#)

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[\[FN4\] § 13.](#)

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[\[FN5\] Garraghty v. Com. of Va., Dept. of Corrections, 52 F.3d 1274 \(4th Cir. 1995\)](#) (referring to law in Virginia).

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[\[FN6\] Mercier v. Town of Fairfield, 628 A.2d 1053 \(Me. 1993\).](#)

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[\[FN7\] Velez Rivera v. Agosto Alicea, 334 F. Supp. 2d 72 \(D.P.R. 2004\), aff'd, 437 F.3d 145 \(1st Cir. 2006\); Mercier v. Town of Fairfield, 628 A.2d 1053 \(Me. 1993\); Fransk v. Curators of University of Missouri, 268 S.W.3d 476, 238 Ed. Law Rep. 937 \(Mo. Ct. App. W.D. 2008\).](#)

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[\[FN8\] Young v. Annarino, 123 F. Supp. 2d 915 \(W.D. N.C. 2000\); Wooldridge v. Greene County, 198 S.W.3d 676 \(Mo. Ct. App. S.D. 2006\).](#)

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[\[FN9\] Wooldridge v. Greene County, 198 S.W.3d 676 \(Mo. Ct. App. S.D. 2006\).](#)

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[\[FN10\] Velez Rivera v. Agosto Alicea](#), 334 F. Supp. 2d 72 (D.P.R. 2004), *aff'd*, 437 F.3d 145 (1st Cir. 2006); [Mercier v. Town of Fairfield](#), 628 A.2d 1053 (Me. 1993); [Fransk v. Curators of University of Missouri](#), 268 S.W.3d 476, 238 Ed. Law Rep. 937 (Mo. Ct. App. W.D. 2008).

- An implied-in-fact contract is a source of state law that can potentially create an expectation of continued public employment. [Kingsford v. Salt Lake City School Dist.](#), 247 F.3d 1123, 153 Ed. Law Rep. 68 (10th Cir. 2001).

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[\[FN11\] Mercier v. Town of Fairfield](#), 628 A.2d 1053 (Me. 1993).

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**§ 137. Authority regulating term or tenure**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [49](#), [50](#), [60](#), [61](#)

**Forms**

[Am. Jur. Legal Forms 2d § 210:22](#) (Provision of public employment contract—Automatic extension of term of employment)

It is clearly within the province of the legislature to enact statutes regulating tenure in public employment.[\[FN1\]](#) The right to tenure in public employment generally is created or arises by statute,[\[FN2\]](#) or adopted regulations,[\[FN3\]](#) or the protections of a contract or collective bargaining agreement authorized by statute.[\[FN4\]](#) Public employees are subject to statutory amendments regarding tenure.[\[FN5\]](#)

The legislature also has the power to fix the term of a public office,[FN6] the general rule being that the legislature may fix the term of officers other than those provided for in the constitution.[FN7] Accordingly, the duration of the term of many public offices is fixed by statute,[FN8] or the constitution of a state.[FN9]

Where a term of office to be filled by appointment is fixed by law, any attempt by the appointing power to change the term so fixed is void.[FN10] Thus, where a statute defines a fixed term, the appointing officer has no authority to appoint an officer for a time shorter than that fixed by law,[FN11] and it is the statutory term that takes precedence when a different term is specified in the actual nomination by the appointing officer.[FN12] Similarly, the language of a letter of appointment is irrelevant in determining whether an officer is granted a fixed term, for the appointing authority cannot confer a right to a fixed term of office when the underlying statute creates no such term.[FN13]

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[FN1] Association of Capitol Powerhouse Engineers v. Division of Bldg. and Grounds, 89 Wash. 2d 177, 570 P.2d 1042, 95 A.L.R.3d 1090 (1977) (disapproved of on other grounds by, Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984)).

- Where the legislature creates a public office, it may impose terms and limitations as to the office's tenure. Venesky v. Ridge, 789 A.2d 862 (Pa. Commw. Ct. 2002), order aff'd, 570 Pa. 461, 809 A.2d 899 (2002).

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[FN2] Amendola v. Schlieve, 732 F.2d 79 (7th Cir. 1984) (referring to Wisconsin law); Axelsen v. Hillsboro Union High School Dist. No. 3, 898 F. Supp. 719, 103 Ed. Law Rep. 1059 (D. Or. 1995) (referring to Oregon law); Merlino v. Borough of Midland Park, 172 N.J. 1, 796 A.2d 203 (2002).

- Tenure in public employment is, where it exists, a matter of legislative grace. Davenport v. Reed, 785 A.2d 1058 (Pa. Commw. Ct. 2001).

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[FN3] Amendola v. Schlieve, 732 F.2d 79 (7th Cir. 1984) (referring to Wisconsin law); Axelsen v. Hillsboro Union High School Dist. No. 3, 898 F. Supp. 719, 103 Ed. Law Rep. 1059 (D. Or. 1995) (referring to Oregon law).

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[FN4] Amendola v. Schlieve, 732 F.2d 79 (7th Cir. 1984) (referring to Wisconsin law).

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[FN5] Greig v. Metzler, 33 Wash. App. 223, 653 P.2d 1346 (Div. 2 1982).

- As to tenure of office of civil service personnel, generally, see Am. Jur. 2d, Civil Service § 41.

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[FN6] Proksa v. Arizona State Schools for the Deaf and the Blind, 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003).

- A term limits act is a valid exercise of the power vested in the legislature. Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

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[FN7] Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975); Sroka v. Municipal Civil Service Commission of City of Buffalo, 57 A.D.2d 1064, 395 N.Y.S.2d 854 (4th Dep't 1977).

- The state constitution contemplates that term limits may be permissibly imposed upon certain offices authorized by the constitution and, thus, it necessarily follows that the constitutionally authorized offices not included in the constitution's disqualification provision may not have a term limit disqualification imposed. Cook v. City of Jacksonville, 823 So. 2d 86, 112 A.L.R.5th 701 (Fla. 2002).

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[FN8] Raven v. Board of Com'rs of Wayne County, 399 Mich. 585, 250 N.W.2d 477 (1977).

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[\[FN9\] Farmer v. Wiseman, 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 \(1941\).](#)

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[\[FN10\] Hoy v. State, 150 Ariz. 416, 724 P.2d 35 \(Ct. App. Div. 1 1984\).](#)

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[\[FN11\] Vescio v. City Manager of City of Yonkers, 69 Misc. 2d 68, 329 N.Y.S.2d 357 \(Sup 1972\), judgment aff'd, 41 A.D.2d 833, 342 N.Y.S.2d 376 \(2d Dep't 1973\).](#)

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[\[FN12\] Goodman v. Clerk of the Circuit Court for Prince George's County, 291 Md. 325, 435 A.2d 422 \(1981\).](#)

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[\[FN13\] Brown v. Superior Court, 15 Cal. 3d 52, 123 Cal. Rptr. 377, 538 P.2d 1137 \(1975\).](#)

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## **§ 138. Modification of constitutional term or tenure**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [51](#)

When a state constitution fixes the tenure of a civil office, it is beyond the power of the legislature to affect the tenure of such constitutional office,[\[FN1\]](#) and it may not abridge or extend the time so provided for such office.[\[FN2\]](#) Similarly, a legislative body cannot unilaterally change the constitutional term of an elective office,[\[FN3\]](#) and cannot extend the term of the incumbent of an elective office where the term is fixed by the constitution.[\[FN4\]](#) Constitutional terms of offices may be shortened[\[FN5\]](#) or extended[\[FN6\]](#) by the vote of the people ratifying a constitutional amendment, although such an amendment will ordinarily not be held



retrospective in its operation unless the terms of the amendment clearly disclose an intention to make it so.[\[FN7\]](#)

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[\[FN1\] Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 \(Me. 1975\).](#)

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[\[FN2\] Farmer v. Wiseman, 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 \(1941\).](#)

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[\[FN3\] Munnelly v. Newkirk, 262 A.D.2d 781, 692 N.Y.S.2d 195 \(3d Dep't 1999\), order aff'd, 93 N.Y.2d 960, 694 N.Y.S.2d 346, 716 N.E.2d 182 \(1999\).](#)

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[\[FN4\] Barrows v. Garvey, 67 Ariz. 202, 193 P.2d 913 \(1948\).](#)

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[\[FN5\] Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 \(1974\).](#)

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[\[FN6\] State ex rel. Casey v. Pauley, 158 W. Va. 298, 210 S.E.2d 649 \(1975\).](#)

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[\[FN7\] Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 \(1974\).](#)

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**§ 139. Modification of statutory tenure or term**

**West's Key Number Digest**

A legislature that creates a public office has the power to modify the term of such office[[FN1](#)] in the public interest,[[FN2](#)] or, as sometimes stated, where a term of office is fixed by the statute that creates the office, only the legislature, by amending the applicable statute, may change that term.[[FN3](#)] The legislature may shorten or lengthen the term of a statutorily created office in the absence of constitutional inhibition,[[FN4](#)] and such a change may be done even during an incumbent's term.[[FN5](#)] There is no constitutional bar against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at the incumbent,[[FN6](#)] and the power to extend legislatively established terms of office is within the discretion of the state legislature, so long as it is reasonable.[[FN7](#)] A budgetary authority, however, has no power to shorten a term of office fixed by legislative act by refusing to appropriate funds necessary to meet payroll requirements.[[FN8](#)] The legislature is also free to change the tenure of officers holding offices created by the legislature.[[FN9](#)]

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[[FN1](#)] [Proksa v. Arizona State Schools for the Deaf and the Blind](#), 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 (2003); [Gosz v. Quattrocchi](#), 448 A.2d 135 (R.I. 1982).

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[[FN2](#)] [Michaelis v. City of Long Beach](#), 46 A.D.2d 772, 360 N.Y.S.2d 473 (2d Dep't 1974).

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[[FN3](#)] [Andersen v. Sundlun](#), 625 A.2d 213 (R.I. 1993).

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[[FN4](#)] [Dodge v. Board of Education of City of Chicago](#), 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937); [Barrows v. Garvey](#), 67 Ariz. 202, 193 P.2d 913 (1948); [Lanza v. Wagner](#), 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344 (1962).

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[[FN5](#)] [Back v. Carter](#), 933 F. Supp. 738 (N.D. Ind. 1996).

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[[FN6](#)] [Michaelis v. City of Long Beach](#), 46 A.D.2d 772, 360 N.Y.S.2d 473 (2d Dep't 1974).

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[[FN7](#)] [Weber v. Pryor](#), 259 Ark. 153, 531 S.W.2d 708 (1976).

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[[FN8](#)] [Blyn v. Bartlett](#), 50 A.D.2d 442, 379 N.Y.S.2d 616 (3d Dep't 1976), order aff'd, 39 N.Y.2d 349, 384 N.Y.S.2d 99, 348 N.E.2d 555 (1976).

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[[FN9](#)] [McCarthy v. Sheriff of Suffolk County](#), 366 Mass. 779, 322 N.E.2d 758 (1975).

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VII. Term of Office or Employment; Tenure  
A. In General

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**§ 140. Construction of provisions regulating term or tenure**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [49](#), [50](#), [60](#), [61](#)

It is necessary, in each case involving a dispute over the meaning of the word "term" as used in statutes relating to public officers, to interpret the word so as to effectuate the statutory scheme pertaining to the office under examination.<sup>[FN1]</sup> Where the enabling statute is silent on a term of public employment, an appointive term may not be derived through implication or interpretation absent authorizing statutory language.<sup>[FN2]</sup>

Legislative attempts to shorten the term of a sitting public official must be strictly construed against such a construction, and clear and convincing language is required to accomplish that end.<sup>[FN3]</sup> This general rule of construction operates, however, only when the legislative intent is not otherwise clearly discernible, and does not apply in derogation of the legislature's apparent intent when such intent can be perceived.<sup>[FN4]</sup>

Given the extreme results that can follow from the interpretation of statutes and regulations governing public employment, courts resolve unanswerable ambiguities against tenure, which in the public employment context means an expectation of continued employment.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Schweisinger v. Jones](#), 68 Cal. App. 4th 1320, 81 Cal. Rptr. 2d 183 (3d Dist. 1998).

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<sup>[FN2]</sup> [DiPaolo v. Passaic County Board of Chosen Freeholders](#), 322 N.J. Super. 487, 731 A.2d 519 (App. Div. 1999), *aff'd*, 162 N.J. 572, 745 A.2d 540 (2000).

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<sup>[FN3]</sup> [In re Saenz](#), 990 S.W.2d 461 (Tex. App. Corpus Christi 1999).

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<sup>[FN4]</sup> [Luther v. Ray](#), 91 Wash. 2d 566, 588 P.2d 1188 (1979).

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<sup>[FN5]</sup> [Crampton v. Harmon](#), 20 Or. App. 676, 533 P.2d 364 (1975).

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**§ 141. Commencement of term**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 52

As a general rule, if a law sets forth a date for the commencement of a term of office, the term commences on that date, regardless of when appointments are actually made or the appointees formally qualify.<sup>[FN1]</sup> Where an office is newly created by legislative action, the term begins when the office is first filled.<sup>[FN2]</sup>

Where no time is fixed by law for the commencement of an official term, the term may begin to run from the date of the election or the date of appointment,<sup>[FN3]</sup> or on the day of the officer's appointment and qualification.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Bryan v. Makosky](#), 380 Md. 603, 846 A.2d 392 (2004).

- The question of when the oath of office is taken is immaterial to the term of the office. [Hawkins v. City of Fayette](#), 604 S.W.2d 716 (Mo. Ct. App. W.D. 1980).

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<sup>[FN2]</sup> [Garrotto v. McManus](#), 185 Neb. 644, 177 N.W.2d 570 (1970).

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<sup>[FN3]</sup> [State ex rel. Sanchez v. Dixon](#), 4 So. 2d 591 (La. Ct. App. 1st Cir. 1941).

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<sup>[FN4]</sup> [Simpson v. City of Gulfport](#), 239 Miss. 136, 121 So. 2d 409 (1960).

- A candidate's right to a specified term of office accrues on the date of assuming office, rather than on the date of election. [In re Advisory Opinion to the Governor-Terms of County Court Judges](#), 750 So. 2d 610 (Fla. 1999).

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**§ 142. Extent and expiration of term**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 50, 53

An appointee's term of office expires when the appointee has served to the legally specified termination date.[\[FN1\]](#) The term of an appointed office not prescribed by statute expires with the expiration of the term of the appointing body.[\[FN2\]](#)

**Observation:** A fixed term alone does not bar the removal of an appointed official,[\[FN3\]](#) and the resignation or the removal of an officer during his or her term and the election or appointment of a successor does not divide the term nor create a new and distinct one.[\[FN4\]](#)

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[\[FN1\]](#) [Denish v. Johnson](#), 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, 106 Ed. Law Rep. 1349 (1996).

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[\[FN2\]](#) [Rawlins v. Levy Court of Kent County](#), 235 A.2d 840 (Del. 1967).

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[\[FN3\]](#) [Venesky v. Ridge](#), 789 A.2d 862 (Pa. Commw. Ct. 2002), order aff'd, 570 Pa. 461, 809 A.2d 899 (2002).

- As to the removal of officers, generally, see [§§ 168 et seq.](#)

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[\[FN4\]](#) [State ex rel. Nixon v. Wakeman](#), 271 S.W.3d 28 (Mo. Ct. App. W.D. 2008), transfer denied, (Dec. 23, 2008).

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## § 143. Validity of term limits

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 49

When an enabling statute sets a fixed term of public office or authorizes the governing body to do so, the ensuing term is valid and binding.<sup>[FN1]</sup> Although term limit provisions may implicate rights protected by the First and 14th Amendments of the United States Constitution, such as the right to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively,<sup>[FN2]</sup> term limitations imposed on public officers by constitutional provisions,<sup>[FN3]</sup> statutes,<sup>[FN4]</sup> and local charters<sup>[FN5]</sup> generally have been upheld as constitutionally valid. Term limit provisions, however, may be held invalid if they violate state constitutional provisions, such as a provision guaranteeing universal eligibility to public office,<sup>[FN6]</sup> or attempt to impose an additional qualification from election to office from what is provided in the state constitution.<sup>[FN7]</sup>

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[FN1] [DiPaolo v. Passaic County Board of Chosen Freeholders](#), 322 N.J. Super. 487, 731 A.2d 519 (App. Div. 1999), *aff'd*, 162 N.J. 572, 745 A.2d 540 (2000).

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[FN2] [Ray v. Mortham](#), 742 So. 2d 1276 (Fla. 1999) (holding modified on other grounds by, [Cook v. City of Jacksonville](#), 823 So. 2d 86, 112 A.L.R.5th 701 (Fla. 2002)).

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[FN3] [U.S. Term Limits, Inc. v. Hill](#), 316 Ark. 251, 872 S.W.2d 349 (1994), judgment *aff'd*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995); [Legislature v. Eu](#), 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309

(1991); [Nevada Judges Ass'n v. Lau](#), 112 Nev. 51, 910 P.2d 898 (1996).

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[FN4] [Rudeen v. Cenarrusa](#), 136 Idaho 560, 38 P.3d 598 (2001).

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[FN5] [Miyazawa v. City of Cincinnati](#), 825 F. Supp. 816 (S.D. Ohio 1993), aff'd, 45 F.3d 126, 1995 FED App. 0028P (6th Cir. 1995); [Cawdrey v. City of Redondo Beach](#), 15 Cal. App. 4th 1212, 19 Cal. Rptr. 2d 179 (2d Dist. 1993), as modified without opinion, (June 1, 1993).

- Local law extending term limits for city officials from two terms to three terms did not violate the substantive due process rights of voters and prospective candidates. [Molinari v. Bloomberg](#), 564 F.3d 587 (2d Cir. 2009).

- As to the terms of office of municipal officers, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 221](#).

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[FN6] [Minneapolis Term Limits Coalition v. Keefe](#), 535 N.W.2d 306 (Minn. 1995).

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[FN7] [Cook v. City of Jacksonville](#), 823 So. 2d 86, 112 A.L.R.5th 701 (Fla. 2002).

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### § 144. Tenure during good behavior; life tenure

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 60

State statutes may authorize certain officials to continue to hold a public office, position, or employment during good behavior and efficiency.[FN1] Tenure during good behavior is, in contemplation of law, the same as during the life of the incumbent, conditioned upon good behavior.[FN2] This, however, is not a rigid formula, precluding any other construction,[FN3] though such tenure is regarded as one for a fixed term.[FN4]

Ordinarily, in the absence of any constitutional restriction, there is no inherent objection to the creation of public offices with the tenure of good behavior.[FN5] A statute or ordinance providing for such tenure, however, is void if there is a constitutional limit to tenure of offices.[FN6]

The principle that the legislature is free to change the tenure of officers holding offices the legislature has created is applicable, though an officer is appointed during good behavior.[FN7]



**Observation:** No federal officers except judges of courts under Article III of the United States Constitution have been given life tenure,[[FN8](#)] and government employees generally do not have life tenure.[[FN9](#)]

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[[FN1](#)] [Butler v. Amato, 224 N.J. Super. 124, 539 A.2d 1241 \(App. Div. 1988\)](#) (statute applicable to persons reappointed to office, position, or employment).

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[[FN2](#)] [Klink v. State ex rel. Budd, 207 Ind. 628, 194 N.E. 352, 99 A.L.R. 317 \(1935\)](#).

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[[FN3](#)] [De Castro v. Board of Com'rs of San Juan, 322 U.S. 451, 64 S. Ct. 1121, 88 L. Ed. 1384 \(1944\)](#).

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[[FN4](#)] [Klink v. State ex rel. Budd, 207 Ind. 628, 194 N.E. 352, 99 A.L.R. 317 \(1935\)](#); [State v. Fousek, 91 Mont. 448, 8 P.2d 791, 84 A.L.R. 303 \(1932\)](#) (overruled on other grounds by, [Melton v. Oleson, 165 Mont. 424, 530 P.2d 466 \(1974\)](#)).

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[[FN5](#)] [Collison v. State ex rel. Green, 39 Del. 460, 2 A.2d 97, 119 A.L.R. 1422 \(1938\)](#).

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[[FN6](#)] [Klink v. State ex rel. Budd, 207 Ind. 628, 194 N.E. 352, 99 A.L.R. 317 \(1935\)](#).

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[[FN7](#)] [McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 322 N.E.2d 758 \(1975\)](#).

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[[FN8](#)] [Shurtleff v. U.S., 189 U.S. 311, 23 S. Ct. 535, 47 L. Ed. 828 \(1903\)](#).

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[[FN9](#)] [Raven v. Board of Com'rs of Wayne County, 399 Mich. 585, 250 N.W.2d 477 \(1977\)](#).

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## § 145. Term of person holding office at pleasure of appointing authority

### West's Key Number Digest

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In the absence of any constitutional inhibition, as where there is no provision requiring that the legislature in the creation of statutory offices prescribe fixed and definite terms, the legislature may create an office to be held during the pleasure of the appointing power.[FN1] Furthermore, where the term of office has not been fixed by a constitutional or statutory provision, it is held at the pleasure of the appointing power despite the appointing power's attempt to fix a definite term of office,[FN2] since the power to appoint an officer for a fixed term does not exist when the appointee is to serve at the pleasure of the appointing power.[FN3] State constitutional provisions have sometimes specifically provided that when the duration of an office is not specified by the constitution or by law, the office is held during the pleasure of the authority making the appointment,[FN4] although such a provision has been deemed to apply only to public officers and not to public employees.[FN5]

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[FN1] [Collison v. State ex rel. Green](#), 39 Del. 460, 2 A.2d 97, 119 A.L.R. 1422 (1938); [State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County](#), 122 Mont. 464, 206 P.2d 166 (1949).

- As to the removal of appointees at will, see [§ 174](#).

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[FN2] [Dumke v. Anderson](#), 44 Ill. App. 3d 626, 3 Ill. Dec. 177, 358 N.E.2d 344 (1st Dist. 1976).

- When a public employee is appointed by an official, the office is held during the pleasure of the authority making the appointment. [Snyder v. City of Moab](#), 354 F.3d 1179 (10th Cir. 2003) (applying Utah law).

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[FN3] [Cabarle v. Governing Body of Pemberton Tp.](#), 167 N.J. Super. 129, 400 A.2d 548 (Law Div. 1979), judgment aff'd, [171 N.J. Super. 586](#), 410 A.2d 281 (App. Div. 1980).

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[FN4] [Lake v. Binghamton Housing Authority](#), 130 A.D.2d 913, 516 N.Y.S.2d 324 (3d Dep't 1987).

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[FN5] [Lake v. Binghamton Housing Authority](#), 130 A.D.2d 913, 516 N.Y.S.2d 324 (3d Dep't 1987).

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**§ 146. Term of person appointed or elected to fill vacancy**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 59

Where both the duration of the term of an office and the time of its commencement or termination are fixed by a constitution or statute, a person elected or appointed to fill a vacancy in such office holds for the unexpired portion of the term<sup>[FN1]</sup> and until the qualification of a successor.<sup>[FN2]</sup> Some constitutional provisions limit to as short a term as possible the tenure of an appointee to a vacancy in an elective office,<sup>[FN3]</sup> and may provide that a person appointed to fill a vacancy in a public office may hold the office for no longer than the commencement of the political year following the first election held after the occurrence of the vacancy.<sup>[FN4]</sup>

There is some authority for the view that where no time is fixed for the beginning or end of the period during which a public office is to be occupied, and the duration of such period is alone designated, a person selected to fill a vacancy in such office may serve the full term and not merely the unexpired balance of the prior incumbent's term.<sup>[FN5]</sup>

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[FN1] [State ex rel. Tobias v. Seitz](#), 161 Ohio St. 269, 53 Ohio Op. 145, 119 N.E.2d 47 (1954); [Andersen v. Sundlun](#), 625 A.2d 213 (R.I. 1993).

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[FN2] [Andersen v. Sundlun](#), 625 A.2d 213 (R.I. 1993).

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[FN3] [Roher v. Dinkins](#), 40 A.D.2d 956, 338 N.Y.S.2d 441 (1st Dep't 1972), order aff'd, 32 N.Y.2d 180, 344 N.Y.S.2d 841, 298 N.E.2d 37 (1973).

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[FN4] [Baranello v. Suffolk County Legislature](#), 126 A.D.2d 296, 513 N.Y.S.2d 444 (2d Dep't 1987).

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[FN5] [Marvel v. Camden County](#), 137 N.J.L. 47, 57 A.2d 455 (N.J. Ct. Err. & App. 1948).

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**§ 147. Authorization and effect of constitutional or statutory provisions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 54

State constitutions may provide that public officers are to continue in office after the expiration of their official terms until their successors are duly qualified.[FN1] Such a constitutional provision is self-executing and mandatory,[FN2] and applies to those public offices created by statute as well as those established by the constitution itself.[FN3] A holdover provision becomes operative only after the officer's term has expired.[FN4]

A provision for holding over may be made applicable to elective as well as appointive officers.[FN5] In determining whether a holdover provision applies to a particular public officer, a reviewing court is guided by the principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is clearly wrong.[FN6] An officer may hold over where there has been a failure to hold an election to choose a successor[FN7] or where an election is held invalid.[FN8]

Provisions for holding over until a successor is elected and qualified do not prolong the incumbent's term indefinitely, but only for a reasonable time to allow a successor to qualify[FN9] by taking the oath and posting bond.[FN10]

A public officer, by seeking re-election, accepting a certificate of election, and qualifying as for a new term, abandons any claim of right to hold over under the constitution and statutes relating to holding over after the conclusion of an officer's term until the election and qualification of a successor.[FN11] One who has been removed from office does not have the right to holdover until a successor is duly qualified.[FN12]

With respect to public offices that cannot be identified with a particular incumbent, there is no holding over beyond the end of the term.[FN13]

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[FN1] [State ex rel. Gebelein v. Killen](#), 454 A.2d 737 (Del. 1982) (disavowed on other grounds by, [State, ex rel. Oberly v. Troise](#), 526 A.2d 898 (Del. 1987)); [Patterson v. Dykes](#), 804 N.E.2d 849 (Ind. Ct. App. 2004); [State ex rel. Olsen v. Swanberg](#), 130 Mont. 202, 299 P.2d 446 (1956); [Denish v. Johnson](#), 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, 106 Ed. Law Rep. 1349 (1996).

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[FN2] [Delamora v. State](#), 128 S.W.3d 344 (Tex. App. Austin 2004), petition for discretionary review refused, (July 28, 2004).

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[FN3] [Opinion of the Justices](#), 672 A.2d 4 (Del. 1995).

- As to the purpose of such provisions being to prevent a temporary vacancy in the office, see [§ 119](#).

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[\[FN4\] Willmann v. City of San Antonio, 123 S.W.3d 469 \(Tex. App. San Antonio 2003\).](#)

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[\[FN5\] State ex rel. Olsen v. Swanberg, 130 Mont. 202, 299 P.2d 446 \(1956\).](#)

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[\[FN6\] Moses v. Koch, 97 Misc. 2d 243, 411 N.Y.S.2d 484 \(Sup 1978\), judgment aff'd, 67 A.D.2d 862, 413 N.Y.S.2d 404 \(1st Dep't 1979\).](#)

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[\[FN7\] Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\).](#)

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[\[FN8\] Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\); Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\).](#)

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[\[FN9\] Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 \(1972\); Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\).](#)

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[\[FN10\] Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\).](#)

- As to oath requirements to take office, generally, see [§§ 121 et seq.](#)

- As to bond requirements, see [§§ 127 et seq.](#)

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[\[FN11\] Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 \(1944\).](#)

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[\[FN12\] Willmann v. City of San Antonio, 123 S.W.3d 469 \(Tex. App. San Antonio 2003\).](#)

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[\[FN13\] State ex rel. Wyrick v. Wright, 678 S.W.2d 61 \(Tenn. 1984\).](#)

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## § 148. Rule in absence of specific provision

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 54

While there is some authority to the contrary,[[FN1](#)] as a general rule, apart from any constitutional or statutory regulation on the subject, an incumbent of an office may hold over after the conclusion of his or her term until the election and qualification of a successor.[[FN2](#)] This general rule applies notwithstanding a provision rendering one elected to an office ineligible to succeed herself or himself.[[FN3](#)]

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[[FN1](#)] [Burnett v. Brown](#), 194 Va. 103, 72 S.E.2d 394 (1952).

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[[FN2](#)] [Hartford Acc. & Indem. Co. v. City of Tulare](#), 30 Cal. 2d 832, 186 P.2d 121 (1947); [Walker v. Hughes](#), 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 (1944); [Grooms v. LaVale Zoning Bd.](#), 27 Md. App. 266, 340 A.2d 385 (1975); [Quinn v. Rent Control Bd. of Peabody](#), 45 Mass. App. Ct. 357, 698 N.E.2d 911 (1998); [State ex rel. Smith v. Tazwell](#), 166 Or. 349, 111 P.2d 1021 (1941).

- Public officials can serve after the expiration of their term until they are replaced. [Burleson v. Hancock County Sheriff's Dept. Civil Service Com'n](#), 872 So. 2d 43 (Miss. Ct. App. 2003).

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[[FN3](#)] [Langford v. State Bd. of Fisheries](#), 217 S.C. 118, 60 S.E.2d 59 (1950); [State ex rel. Stain v. Christensen](#), 84 Utah 185, 35 P.2d 775 (1934).

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## § 149. Effect on officer

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### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 37](#) (Complaint, petition, or declaration—  
For judgment declaring county officer to be holdover officer and ordering reinstatement and back pay until  
successor is appointed—By county officer who failed to be confirmed for additional term in office)

A hold-over officer has all the authority to act in that capacity and receive compensation.[FN1] An officer is not prevented from continuing to discharge the duties of his or her office after his or her term where no successor has been chosen, even by a provision of a constitution stating that the duration of an office should not exceed a given number of years.[FN2] In this regard, a mandatory constitutional time limit within which appointments were required to be made was not applicable where the existence of a vacancy was precluded by an incumbent lawfully holding over.[FN3]

One who holds over until his or her successor is qualified continues as the incumbent of the office, although he or she has formally resigned and the resignation has been accepted.[FN4] Once the appointing authority has appointed an individual, and such person has qualified for the position, this activity effectively terminates title and tenure of one holding over in that position.[FN5]

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[FN1] [Delamora v. State, 128 S.W.3d 344 \(Tex. App. Austin 2004\)](#), petition for discretionary review refused, (July 28, 2004).

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[FN2] [State ex rel. Smith v. Tazwell, 166 Or. 349, 111 P.2d 1021 \(1941\)](#).

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[FN3] [Zemprelli v. Thornburgh, 55 Pa. Commw. 330, 423 A.2d 1072 \(1980\)](#).

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[FN4] [State ex rel. Coe v. Lee, 147 Fla. 464, 3 So. 2d 497 \(1941\)](#).

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[FN5] [Seemann v. Kinch, 606 A.2d 1308 \(R.I. 1992\)](#).

- When the rights of the successor vest those of the incumbent holdover terminate. [Westphal v. City of Council Bluffs, 275 N.W.2d 439 \(Iowa 1979\)](#).

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VII. Term of Office or Employment; Tenure  
C. Holding Over

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**§ 150. Effect on term or tenure of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 54

A term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he or she was appointed.[FN1] The period between the expiration of an officer's term and the qualification of his or her successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period.[FN2] This is true even where a person is elected as his or her own successor.[FN3] Thus, a holdover does not change the length of the term, but merely shortens the tenure of the succeeding officer.[FN4] Accordingly, when the term of an office holder has expired and the office holder remains in office as a holdover for a period of time until his or her successor is appointed and qualified, the successor's appointment must be made for the term commencing on the date the office holder's term expired rather than on the date of appointment, and the duration of the appointed successor's term will be the unexpired balance of the term that commenced on the expiration of the original office holder's term.[FN5]

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[FN1] [State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876 \(N.D. 1985\); Selway v. Schultz, 268 N.W.2d 149 \(S.D. 1978\).](#)

- The fact that an appointed officer's tenure necessarily extends beyond the end of a statutory term or impinges on the following term does not lengthen or shorten the term of office. [State ex rel. Racicot v. District Court of First Judicial Dist. In and For County of Lewis and Clark, 243 Mont. 379, 794 P.2d 1180 \(1990\).](#)

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[FN2] [Tappy v. State ex rel. Byington, 82 So. 2d 161 \(Fla. 1955\); State ex rel. Olsen v. Swanberg, 130 Mont. 202, 299 P.2d 446 \(1956\); State ex rel. Smith v. Tazwell, 166 Or. 349, 111 P.2d 1021 \(1941\).](#)

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[FN3] [State ex rel. Coe v. Lee, 147 Fla. 464, 3 So. 2d 497 \(1941\).](#)

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[FN4] [Delaware River Port Authority v. Hughes, 46 N.J. 451, 217 A.2d 865 \(1966\); State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876 \(N.D. 1985\); Selway v. Schultz, 268 N.W.2d 149 \(S.D. 1978\).](#)

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[FN5] [Opinion of the Justices, 112 N.H. 433, 298 A.2d 118 \(1972\).](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
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§ 151. Generally

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 7, 60

A public employer is under no constitutional or other legal obligation to retain an employee whose conduct the public employer deems disruptive of its operation.[FN1] Furthermore, actual harm is not required to impose discipline on a public employee, as an employee's violation of a departmental rule, thereby compromising the security or integrity of the facility where he or she is employed, is sufficient to justify disciplinary action.[FN2] Even so, a central feature of some state personnel systems is the principle that persons within the system can be subjected to discipline only for just cause.[FN3]

No general right to continued public employment exists in some states, and such a right must be shown to exist by statute, ordinance, regulation, or employment contract.[FN4] However, for public employees, at-will employment may be modified by agreement with the employer, as in a personnel manual, and through civil service systems.[FN5] A state employee, who by legislative classification can be dismissed only for cause, has a constitutionally protected property interest in continued employment[FN6] that entitles the employee to due process before he or she can be terminated.[FN7] Whether a government employee has a protected property right in continued employment is initially a matter of state law.[FN8]

**Practice Tip:** The burden is on a government employee, asserting a claim for wrongful termination based on the existence of an implied employment agreement, to establish that adherence to policies and procedures is the result of a contractual commitment by the employer.[FN9]

While public employees do not surrender their constitutional rights in entering public employment, those rights must be balanced against the realities of the employment context, as it would be particularly disruptive of governmental operations to subject employment decisions based on characteristics unique to an individual, that is, decisions which are by their nature subjective and discretionary, to constitutional rationality review.[FN10]

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[FN1] [Zaretsky v. New York City Health and Hospitals Corp.](#), 84 N.Y.2d 140, 615 N.Y.S.2d 341, 638 N.E.2d 986 (1994).

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[FN2] [Nebraska Dept. of Correctional Services v. Hansen](#), 238 Neb. 233, 470 N.W.2d 170 (1991).

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[FN3] [Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen](#), 886 P.2d 700 (Colo. 1994).

- As to grounds for removal, suspension, or demotion of civil service employees, generally, see [Am. Jur. 2d](#),

[Civil Service §§ 63 et seq.](#)

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[FN4] [Fransk v. Curators of University of Missouri](#), 268 S.W.3d 476, 238 Ed. Law Rep. 937 (Mo. Ct. App. W.D. 2008).

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[FN5] [County of Dallas v. Wiland](#), 216 S.W.3d 344 (Tex. 2007).

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[FN6] [Carlson v. Arizona State Personnel Bd.](#), 214 Ariz. 426, 153 P.3d 1055 (Ct. App. Div. 1 2007); [Virginia Dept. of Corrections v. Compton](#), 47 Va. App. 202, 623 S.E.2d 397 (2005).

- State employees subject to statute protecting those who have acquired regular status from separation except in certain situations are not at-will employees. [Rushing v. SAIF Corp.](#), 223 Or. App. 665, 196 P.3d 115 (2008).

-

[FN7] [Carlson v. Arizona State Personnel Bd.](#), 214 Ariz. 426, 153 P.3d 1055 (Ct. App. Div. 1 2007).

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[FN8] [Fransk v. Curators of University of Missouri](#), 268 S.W.3d 476, 238 Ed. Law Rep. 937 (Mo. Ct. App. W.D. 2008).

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[FN9] [Gagnon v. Housatonic Valley Tourism Dist. Com'n](#), 92 Conn. App. 835, 888 A.2d 104 (2006).

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[FN10] [Hunt v. Sycamore Community School Dist. Bd. of Educ.](#), 542 F.3d 529, 237 Ed. Law Rep. 59 (6th Cir. 2008).

- As to dismissal for constitutionally protected activity, see §§ [175](#), [176](#).

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## Trial Strategy

[Constructive Discharge—Employee's Resignation Due to Intolerable Working Conditions as Tantamount to Discharge, 33 Am. Jur. Proof of Facts 3d 235](#)

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Am. Jur. Legal Forms 2d § 213:63

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## § 152. Generally; right to resign

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 62

By definition, a "resignation" by a public officer constitutes the formal renouncement or relinquishing of a public office.[\[FN1\]](#) A public officer generally has the right to resign,[\[FN2\]](#) absent any constitutional or statutory provision to the contrary,[\[FN3\]](#) and even where there are provisions for an officer to hold over until the election and qualification of a successor.[\[FN4\]](#) In this regard, there is absolutely no reason to qualify or limit an officer's right to relinquish public office where adequate safeguards exist to protect the public and the rights of creditors.[\[FN5\]](#) Furthermore, it has been said that any public employee may terminate his or her employment by tendering a resignation absent a showing of fraud, coercion, or duress.[\[FN6\]](#)

**Observation:** A knowing and voluntary resignation waives any right to the procedural protections to which an employee would otherwise be entitled.[\[FN7\]](#)

A public officer is not disabled from resigning by or by the pendency of removal proceedings.[\[FN8\]](#)

A government agency's duty to inform its employee who has resigned of the employee's appeal rights arises only when the impetus for resignation originates with and is advanced by the governmental agency.[\[FN9\]](#)

**Observation:** Under the common law, one person cannot simultaneously hold two incompatible offices, and the general rule is that the acceptance and qualification for a second office incompatible with the first office is an implied resignation of the first office.[\[FN10\]](#)

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[\[FN1\]](#) [Voss v. City of Roseburg, 22 Or. App. 445, 539 P.2d 1105 \(1975\).](#)

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[\[FN2\]](#) [Rockingham County v. Luten Bridge Co., 35 F.2d 301, 66 A.L.R. 735 \(C.C.A. 4th Cir. 1929\); Tooele County v. De La Mare, 90 Utah 46, 59 P.2d 1155, 106 A.L.R. 182 \(1936\).](#)

- As to resignation of civil service employees, see [Am. Jur. 2d, Civil Service § 61](#).

- As to resignation of judges, see [Am. Jur. 2d, Judges § 13](#).

- As to resignation of municipal officers, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 259 et seq.](#)

- As to resignation of sheriffs, police officers, and constables, see [Am. Jur. 2d, Sheriffs, Police, and Constables § 20](#).

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[\[FN3\]](#) [DeLuca v. Rhode Island State Bd. of Elections, 119 R.I. 59, 376 A.2d 326 \(1977\).](#)

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[\[FN4\]](#) [Tooele County v. De La Mare, 90 Utah 46, 59 P.2d 1155, 106 A.L.R. 182 \(1936\).](#)

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[\[FN5\]](#) [Smith v. Brantley, 400 So. 2d 443 \(Fla. 1981\).](#)

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[\[FN6\]](#) [Jones v. Town of Wayland, 374 Mass. 249, 373 N.E.2d 199 \(1978\).](#)

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[\[FN7\]](#) [Scherer v. Davis, 543 F. Supp. 4 \(N.D. Fla. 1981\), aff'd, 710 F.2d 838 \(11th Cir. 1983\), judgment rev'd on other grounds, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 \(1984\).](#)

- As to hearing and notice requirements with regard to a public officer's or employee's dismissal or removal,

generally, see [§§ 441 et seq.](#)

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[FN8] [In re Peoples](#), 296 N.C. 109, 250 S.E.2d 890 (1978).

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[FN9] [Arizona Dept. of Economic Sec. v. Redlon](#), 215 Ariz. 13, 156 P.3d 430 (Ct. App. Div. 2 2007).

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[FN10] [In re Guerra](#), 235 S.W.3d 392 (Tex. App. Corpus Christi 2007), reh'g overruled, (Oct. 16, 2007).

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**§ 153. Manner of, and requirements for, valid resignation, generally**

**West's Key Number Digest**

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## Forms

Am. Jur. Legal Forms 2d § 213:63 (Resignation of public officer)

A resignation of a public officer need not be in any particular form, unless the form is prescribed by statute.[FN1] In this regard, some state public officer laws govern the manner in which resignations of public officers may be tendered, and it is apparent that guidelines imposed under such statutes are designed not only to establish orderly procedures but to safeguard the public trust placed in such officers.[FN2] A statute, in providing the particular mode by which a public officer may resign, states the exclusive method of

resignation,[[FN3](#)] and the resignation of a public officer who fails to comply with such statutory requirements is ineffectual.[[FN4](#)] Even so, in determining the effectiveness of a resignation, courts do not always require literal compliance with the applicable statutory provision, but look to the sufficiency of the resignation under the particular circumstances.[[FN5](#)]

Absent any constitutional or statutory provision to the contrary, a resignation may be either written or oral,[[FN6](#)] or implied by conduct.[[FN7](#)] Conduct indicating resignation of a public office is action signifying to the voters at large that the officer is done with his or her former duties, as where the officer assumes another inconsistent or incompatible office.[[FN8](#)] However, effective resignation of an office requires an intention to relinquish, accompanied by an act of relinquishment[[FN9](#)] which is unequivocal.[[FN10](#)]

A written resignation must be signed by the party tendering it.[[FN11](#)]

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[[FN1](#)] [Hogg v. Miller, 298 Ky. 128, 182 S.W.2d 242 \(1944\).](#)

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[[FN2](#)] [Scriven v. Wade, 208 A.D.2d 1035, 617 N.Y.S.2d 402 \(3d Dep't 1994\).](#)

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[[FN3](#)] [Vescio v. City Manager of City of Yonkers, 69 Misc. 2d 68, 329 N.Y.S.2d 357 \(Sup 1972\), judgment aff'd, 41 A.D.2d 833, 342 N.Y.S.2d 376 \(2d Dep't 1973\).](#)

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[[FN4](#)] [Burke v. Van Buskirk, 47 A.D.2d 965, 365 N.Y.S.2d 932 \(3d Dep't 1975\).](#)

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[[FN5](#)] [State ex rel. Shevin v. Stone, 279 So. 2d 17 \(Fla. 1972\).](#)

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[[FN6](#)] [Hogg v. Miller, 298 Ky. 128, 182 S.W.2d 242 \(1944\); DeLuca v. Rhode Island State Bd. of Elections, 119 R.I. 59, 376 A.2d 326 \(1977\).](#)

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[[FN7](#)] [Fruhling v. Champaign County, 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 \(4th Dist. 1981\); State ex rel. Waldman v. Burke, 152 Ohio St. 213, 40 Ohio Op. 220, 88 N.E.2d 578 \(1949\).](#)

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[[FN8](#)] [DeLuca v. Rhode Island State Bd. of Elections, 119 R.I. 59, 376 A.2d 326 \(1977\).](#)

- As to the acceptance of an incompatible office as vacating or implying resignation of the first office, generally, see [§ 61](#).

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[[FN9](#)] [Patten v. Miller, 190 Ga. 123, 8 S.E.2d 757 \(1940\); Fruhling v. Champaign County, 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 \(4th Dist. 1981\); Hogg v. Miller, 298 Ky. 128, 182 S.W.2d 242 \(1944\).](#)

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[[FN10](#)] [Fruhling v. Champaign County, 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 \(4th Dist. 1981\).](#)

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[[FN11](#)] [DeLuca v. Rhode Island State Bd. of Elections, 119 R.I. 59, 376 A.2d 326 \(1977\).](#)

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**§ 154. Persons or bodies to whom resignation is tendered or given**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 62

In the absence of a statutory direction, a public officer should tender his or her resignation to the tribunal having authority to appoint a successor.[\[FN1\]](#) A resignation tendered to an improper person or body is a nullity.[\[FN2\]](#) Furthermore, under some state statutes pertaining to public officers, a particular officer may not resign to himself or herself, but instead, must resign to the Secretary of State.[\[FN3\]](#)

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[\[FN1\]](#) [McCarthy v. State ex rel. Harless](#), 55 Ariz. 328, 101 P.2d 449 (1940); [Sawyer v. City of San Antonio](#), 149 Tex. 408, 234 S.W.2d 398 (1950); [Tooele County v. De La Mare](#), 90 Utah 46, 59 P.2d 1155, 106 A.L.R. 182 (1936).

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[\[FN2\]](#) [McCarthy v. State ex rel. Harless](#), 55 Ariz. 328, 101 P.2d 449 (1940).

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[\[FN3\]](#) [Scriven v. Wade](#), 208 A.D.2d 1035, 617 N.Y.S.2d 402 (3d Dep't 1994).

- As to an officer's withdrawal of his or her resignation, generally, see §§ [156](#), [157](#).

- As to resignation of municipal officers, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 259 et seq.](#)

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§ 155. Acceptance

West's Key Number Digest

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There is some authority for the view that to be effective the resignation must be accepted by competent authority,[[FN1](#)] either in terms or by something tantamount to an acceptance, such as the appointment of a successor.[[FN2](#)] Acceptance by the appointing authority is specifically required in some jurisdictions.[[FN3](#)]

In other jurisdictions, however, a public officer's resignation, stated to be effective immediately, is effective upon submission to the proper authority and the governor's acceptance is not necessary in order to create a vacancy.[[FN4](#)] Furthermore, the view has sometimes been followed that affirmative action of the officer receiving the resignation is necessary in order to preclude it from becoming effective, and absent such affirmative action, the resignation becomes effective.[[FN5](#)] An acceptance is also not necessary to render effective a resignation from a public office where the applicable statute provides that the office is to become vacant on resignation of the incumbent.[[FN6](#)] Furthermore, a public officer's resignation, stated to be effective immediately, was deemed to be effective upon submission to the proper authority notwithstanding a statute requiring the governor's acceptance of such a resignation, where such statutory requirement was construed to apply only in those rare and dire situations when the public weal was affected adversely by the absence of an officeholder.[[FN7](#)]

Even so, in some jurisdictions which do not require acceptance of an unconditional resignation, a conditional resignation must be accepted to be effective.[[FN8](#)]

Where required, acceptance of a resignation need not be a formal rite, and in such a case any action evidencing agreement is sufficient.[[FN9](#)]

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[[FN1](#)] [Rider v. City of Batesville](#), 220 Ark. 31, 245 S.W.2d 822 (1952); [Com. ex rel. Wootton v. Berninger](#), 255 Ky. 451, 74 S.W.2d 932, 95 A.L.R. 213 (1934); [Green v. Jones](#), 144 W. Va. 276, 108 S.E.2d 1 (1959), on reh'g, 144 W. Va. 276, 110 S.E.2d 329 (1959) and (overruled on other grounds by, [Adkins v. Smith](#), 185 W. Va. 481, 408 S.E.2d 60, 69 Ed. Law Rep. 923 (1991)).

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[[FN2](#)] [Com. ex rel. Wootton v. Berninger](#), 255 Ky. 451, 74 S.W.2d 932, 95 A.L.R. 213 (1934); [Sawyer v. City of San Antonio](#), 149 Tex. 408, 234 S.W.2d 398 (1950).

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[\[FN3\] Attorney General ex rel. Chamberlin v. Nadeau, 110 N.H. 264, 266 A.2d 118 \(1970\).](#)

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[\[FN4\] People ex rel. Adamowski v. Kerner, 19 Ill. 2d 506, 167 N.E.2d 555, 82 A.L.R.2d 740 \(1960\).](#)

- As to vacancies in office, generally, see [§§ 104 et seq.](#)

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[\[FN5\] People ex rel. Adamowski v. Kerner, 19 Ill. 2d 506, 167 N.E.2d 555, 82 A.L.R.2d 740 \(1960\).](#)

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[\[FN6\] People ex rel. Adamowski v. Kerner, 19 Ill. 2d 506, 167 N.E.2d 555, 82 A.L.R.2d 740 \(1960\).](#)

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[\[FN7\] Smith v. Brantley, 400 So. 2d 443 \(Fla. 1981\).](#)

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[\[FN8\] City of Chicago ex rel. Martin-Trigona v. O'Malley, 69 Ill. 2d 474, 14 Ill. Dec. 475, 372 N.E.2d 671 \(1978\).](#)

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[\[FN9\] Voss v. City of Roseburg, 22 Or. App. 445, 539 P.2d 1105 \(1975\).](#)

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**§ 156. Withdrawal, cancellation, or amendment**

**West's Key Number Digest**

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If a public officer submits a resignation that, by its terms, is effective immediately or on a future date, the resignation is an unalterable fact, and the officer cannot withdraw the resignation and cannot negate it by continuing to perform the job.[FN1] This rule has been based on the reasoning that public policy requires that there be no uncertainty as to who are and who are not public officers.[FN2] However, it has also been said that absent valid enactments to the contrary, a public employee can withdraw a resignation if he or she does so: (1) before its effective date; (2) before it is accepted; and (3) before the appointing power acts in reliance on the resignation.[FN3]

On the other hand, statutes in some jurisdictions provide that a resignation delivered or filed may not be withdrawn, canceled, or amended except by consent of the officer to whom it was delivered or the body with which it was filed.[FN4] Where acceptance of a resignation is required, an immediately effective resignation may be withdrawn before it is acted upon, but not after acceptance.[FN5] Furthermore, the resignation of an officer, effective at a future date, may not be withdrawn after the resignation has been accepted,[FN6] although a public employee is entitled to withdraw a prospective resignation if the employee does so before its effective date, before it has been accepted,[FN7] and before the appointing power acts in reliance on the resignation, unless valid enactments provide otherwise.[FN8]

Whether to allow the withdrawal of a public employee's letter of resignation is a decision to be made by the appointing authority in the exercise of sound discretion,[FN9] but it may not exercise such discretion in an arbitrary or capricious manner.[FN10]

**Practice Tip:** When the decision to consent to the withdrawal of a state employee's resignation is a discretionary act, a proceeding challenging a refusal to consent to withdrawal is in the nature of mandamus to review.[FN11]

A state employee's unexpressed intent to return to work at some future time does not produce an automatic expungement of the employee's resignation pursuant to a personnel regulation providing that a resignation without notice may be expunged by the appointing authority when extenuating circumstances exist and the employee had good cause for not notifying the appointing authority.[FN12]

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[FN1] [Rohrback v. Illinois Dept. of Employment Sec.](#), 361 Ill. App. 3d 298, 296 Ill. Dec. 602, 835 N.E.2d 955 (4th Dist. 2005).

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[FN2] [Allen v. Powell](#), 42 Ill. 2d 66, 244 N.E.2d 596 (1969).

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[FN3] [Travis v. Tacoma Public School Dist.](#), 120 Wash. App. 542, 85 P.3d 959 (Div. 2 2004).

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[FN4] [Scriven v. Wade](#), 208 A.D.2d 1035, 617 N.Y.S.2d 402 (3d Dep't 1994).

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[FN5] [Rider v. City of Batesville](#), 220 Ark. 31, 245 S.W.2d 822 (1952).

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[FN6] [Rider v. City of Batesville](#), 220 Ark. 31, 245 S.W.2d 822 (1952); [People ex rel. Adamowski v. Kerner](#), 19 Ill. 2d 506, 167 N.E.2d 555, 82 A.L.R.2d 740 (1960); [Redmon v. McDaniel](#), 540 S.W.2d 870 (Ky. 1976).

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[FN7] [Ex parte Rhea](#), 426 So. 2d 838 (Ala. 1982).

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[FN8] [Armistead v. State Personnel Board](#), 22 Cal. 3d 198, 149 Cal. Rptr. 1, 583 P.2d 744 (1978).

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[\[FN9\] Pishotti v. New York State Thruway Authority, 38 A.D.3d 1122, 833 N.Y.S.2d 675 \(3d Dep't 2007\).](#)

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[\[FN10\] Wonderly v. Division of New York State Police, 80 A.D.2d 974, 438 N.Y.S.2d 611 \(3d Dep't 1981\).](#)

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[\[FN11\] Martinez v. State University of New York-College at Oswego, 13 A.D.3d 749, 787 N.Y.S.2d 409, 194 Ed. Law Rep. 930 \(3d Dep't 2004\).](#)

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[\[FN12\] Department of Public Safety and Correctional Services v. Thomas, 158 Md. App. 540, 857 A.2d 638 \(2004\).](#)

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**§ 157. Voluntariness; effect of duress or fraud**

**West's Key Number Digest**

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**Trial Strategy**

[Constructive Discharge—Employee's Resignation Due to Intolerable Working Conditions as Tantamount to Discharge, 33 Am. Jur. Proof of Facts 3d 235](#)

When an employee resigns from government service, there is a presumption of voluntariness, and unless the aggrieved employee comes forward to the appropriate administrative body with sufficient evidence to establish

that his or her termination was involuntarily brought about, the initial presumption will prevail.[FN1] The presumption of voluntariness arising from a public employee's decision to resign may be rebutted by presenting evidence to demonstrate that the resignation was offered under duress, caused by the government's coercive acts, or that the resignation was the result of government misrepresentation.[FN2] A public employee's decision to resign is said to be voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make the choice, and is permitted to set the effective date.[FN3] However, a public employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information.[FN4] For a public employee's resignation to be rendered involuntary on account of duress or coercion, three criteria must be met: (1) the agency imposed the terms of the employee's resignation; (2) the employee's circumstances permitted no alternative but to accept; and (3) those circumstances were the result of improper acts of the agency.[FN5] The test for determining when duress vitiates an apparently voluntary resignation is objective, and the employee's subjective feelings are irrelevant.[FN6]

**Observation:** A public employee's voluntary decision to resign is not rendered involuntary simply because the employee faces a difficult situation in which his or her choice is limited to one of two unpleasant alternatives.[FN7] Thus, where a public employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act.[FN8]

The doctrine of coercive involuntariness does not apply to a case in which a public employee decides to resign because he or she does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that the employee feels that he or she has no realistic option but to leave.[FN9]

A resignation may be found involuntary if induced by an employee's reasonable reliance upon an employer's misrepresentation of a material fact concerning the resignation.[FN10] A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.[FN11] The reliance must be reasonable under the circumstances.[FN12]

A resignation of a public officer procured by duress or fraud is voidable and may be repudiated, especially where the duress or fraud is imposed or committed by the authority having the duty of accepting or rejecting the resignation.[FN13] In addition, in this regard, a resignation from public office that is the result of duress may be withdrawn.[FN14]

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[FN1] [Christie v. U. S.](#), 207 Ct. Cl. 333, 518 F.2d 584 (1975).

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[FN2] [Murphy v. U.S.](#), 69 Fed. Cl. 593 (2006), aff'd on other grounds, 223 Fed. Appx. 966 (Fed. Cir. 2007).

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[FN3] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN4] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN5] [Keyes v. District of Columbia](#), 372 F.3d 434 (D.C. Cir. 2004); [Garcia v. Department of Homeland Security](#), 437 F.3d 1322 (Fed. Cir. 2006).

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[FN6] [Scruggs v. Department of Army](#), 86 Fed. Appx. 413 (Fed. Cir. 2004).

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[FN7] [Murphy v. U.S.](#), 69 Fed. Cl. 593 (2006), aff'd on other grounds, 223 Fed. Appx. 966 (Fed. Cir. 2007).

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[\[FN8\] Keyes v. District of Columbia, 372 F.3d 434 \(D.C. Cir. 2004\).](#)

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[\[FN9\] District of Columbia Metropolitan Police Dept. v. Stanley, 942 A.2d 1172 \(D.C. 2008\).](#)

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[\[FN10\] Keyes v. District of Columbia, 372 F.3d 434 \(D.C. Cir. 2004\).](#)

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[\[FN11\] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 \(4th Cir. 1988\).](#)

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[\[FN12\] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 48 Ed. Law Rep. 1046 \(4th Cir. 1988\).](#)

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[\[FN13\] Board of Educ. of Wolfe County v. Rose, 285 Ky. 217, 147 S.W.2d 83, 132 A.L.R. 969 \(1940\).](#)

- As to duress, generally, see [Am. Jur. 2d, Duress and Undue Influence §§ 1 et seq.](#)

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[\[FN14\] Crouch v. Civil Service Commission of Texas City, 459 S.W.2d 491 \(Tex. Civ. App. Houston 14th Dist. 1970\), writ refused n.r.e., \(Jan. 20, 1971\).](#)

- As to the withdrawal of resignations by public officers, generally, see [§ 156.](#)

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**§ 158. Time; effect on holding of office**

**West's Key Number Digest**

One who gains an elective public office may resign at any time he or she chooses.[\[FN1\]](#) However, a resignation tendered by an individual before he or she is appointed is void, and the lapse of time cannot render it valid.[\[FN2\]](#)

It has been said that a resignation once tendered is final and becomes effective when it is received by, or filed with, the officer authorized by law to fill the vacancy.[\[FN3\]](#) However, there is also authority for the view, that when a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives.[\[FN4\]](#) In this regard, a resignation of public office to take effect on a certain day operates in the first moment of that day, terminating the officer's authority to perform official acts in the course of the day.[\[FN5\]](#) Furthermore, the view has been followed that once a public official has voluntarily resigned and the resignation has been accepted, an immediate severance from office is affected.[\[FN6\]](#)

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[\[FN1\]](#) *Oklahoma State Election Bd. v. Coats*, 1980 OK 65, 610 P.2d 776 (Okla. 1980).

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[\[FN2\]](#) *Meyer v. Hurley*, 67 Ill. App. 3d 353, 24 Ill. Dec. 61, 384 N.E.2d 928 (1st Dist. 1978).

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[\[FN3\]](#) *Cole v. McGillicuddy*, 21 Ill. App. 3d 645, 316 N.E.2d 109 (1st Dist. 1974).

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[\[FN4\]](#) *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

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[\[FN5\]](#) *City of Lawrence v. MacDonald*, 318 Mass. 520, 62 N.E.2d 850, 161 A.L.R. 955 (1945).

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[\[FN6\]](#) *Voss v. City of Roseburg*, 22 Or. App. 445, 539 P.2d 1105 (1975).

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### **§ 159. Abandonment, generally**

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A public office may become vacant ipso facto by abandonment.[FN1] An office may be impliedly abandoned.[FN2] The abandonment of an office may be indicated by the action of the incumbent in voluntarily surrendering it to another under a mistaken belief that the latter has been elected as his or her rightful successor,[FN3] or by acquiescing in his or her own removal.[FN4] Abandonment may also result from the intentional and completed relinquishment of any claim to the office.[FN5] A public office or position may also be abandoned by the holder when he or she accepts or demands pension or retirement pay.[FN6]

**Practice Tip:** Once an office is abandoned, the former incumbent cannot legally repossess it even by forcible reoccupancy.[FN7]

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[FN1] § 114.

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[FN2] Fruhling v. Champaign County, 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 (4th Dist. 1981).

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[FN3] Walter v. Adams, 110 Cal. App. 2d 484, 243 P.2d 21 (3d Dist. 1952); Thompson v. Nichols, 208 Ga. 147, 65 S.E.2d 603 (1951); Haack v. Ranieri, 83 N.J. Super. 526, 200 A.2d 522 (Law Div. 1964).

- As to abandonment of employment by civil service employees, see Am. Jur. 2d, Civil Service § 55.

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[FN4] Walter v. Adams, 110 Cal. App. 2d 484, 243 P.2d 21 (3d Dist. 1952); Thompson v. Nichols, 208 Ga. 147, 65 S.E.2d 603 (1951).

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[FN5] Hall v. Allen, 313 Ky. 441, 231 S.W.2d 702 (1950).

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[FN6] State ex rel. Schaub v. City of Scottsbluff, 169 Neb. 525, 100 N.W.2d 202, 76 A.L.R.2d 1304 (1960).

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[FN7] State ex rel. Schaub v. City of Scottsbluff, 169 Neb. 525, 100 N.W.2d 202, 76 A.L.R.2d 1304 (1960).

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**§ 160. Elements and requisites for abandonment**

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Effective abandonment of an office requires an intention to relinquish, accompanied by an unequivocal act of relinquishment.<sup>[FN1]</sup> Abandonment of employment by a public employee must be total and absolute,<sup>[FN2]</sup> and must be under such circumstances as to clearly indicate an absolute relinquishment of the employment.<sup>[FN3]</sup> The officer must manifest a clear intention to abandon the office and its duties,<sup>[FN4]</sup> and such intention may be inferred from conduct.<sup>[FN5]</sup> If the acts and statements of the public officer clearly indicate an absolute relinquishment of the office, a vacancy is created thereby without the necessity of a judicial determination.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Fruhling v. Champaign County](#), 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 (4th Dist. 1981).

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<sup>[FN2]</sup> [Matter of Viviani](#), 184 N.J. Super. 582, 446 A.2d 1239 (App. Div. 1982).

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<sup>[FN3]</sup> [Walter v. Adams](#), 110 Cal. App. 2d 484, 243 P.2d 21 (3d Dist. 1952); [State ex rel. Schaub v. City of Scottsbluff](#), 169 Neb. 525, 100 N.W.2d 202, 76 A.L.R.2d 1304 (1960).

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<sup>[FN4]</sup> [Walter v. Adams](#), 110 Cal. App. 2d 484, 243 P.2d 21 (3d Dist. 1952); [Haack v. Ranieri](#), 83 N.J. Super. 526, 200 A.2d 522 (Law Div. 1964).

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<sup>[FN5]</sup> [State v. Green](#), 206 Ark. 361, 175 S.W.2d 575 (1943); [Vanderbach v. Hudson County Bd. of Taxation](#), 133 N.J.L. 126, 42 A.2d 848 (N.J. Ct. Err. & App. 1945).

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<sup>[FN6]</sup> [§ 114](#).

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The abandonment of an office may be shown by the action of the officer in leaving the state<sup>[FN1]</sup> or changing his or her residence from the territorial jurisdiction of the office.<sup>[FN2]</sup> Mere temporary absences without intent to change domicil or to abandon an office or cease to discharge its duties will not terminate title to an office on the grounds of nonresidency.<sup>[FN3]</sup> Furthermore, a temporary absence is not sufficient to constitute an abandonment of an office and does not ipso facto create a vacancy where no statute fixes the period beyond which the absence must not continue.<sup>[FN4]</sup>

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[FN1] [State v. Green, 206 Ark. 361, 175 S.W.2d 575 \(1943\).](#)

- As to vacancy in office in case of absence or change of residence, see [§ 118](#).

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[FN2] [State v. Green, 206 Ark. 361, 175 S.W.2d 575 \(1943\); Mulholland v. Ayers, 109 Mont. 558, 99 P.2d 234 \(1940\).](#)

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[FN3] [Janisch v. La Porte County, 161 Ind. App. 226, 315 N.E.2d 387 \(1974\).](#)

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[FN4] [State v. Green, 206 Ark. 361, 175 S.W.2d 575 \(1943\).](#)

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[Mandatory retirement of public officer or employee based on age, 81 A.L.R.3d 811](#)

One holding an elective public office may retire at any time he or she chooses.[FN1]

Although the Age Discrimination in Employment Act (ADEA)[FN2] prohibits age discrimination by employers, including generally the federal government, as well as the states, their political subdivisions, and any interstate agencies,[FN3] and a mandatory or optional retirement age is a term or condition of employment governed by the ADEA, so that, under the Act, a seniority system or employee benefit plan generally cannot require or permit the involuntary retirement of an individual over the age of 40 on the basis of age,[FN4] the ADEA's prohibition against involuntary retirement is not violated if the retirement is based on a number of specified factors, including: an employee's status as a high level policymaker; a person's status as a state or local firefighter or law enforcement officer; a person's status as a federal employee in certain occupations governed by Congressionally established retirement ages.[FN5] Even so, the power to establish a state or local pension fund for public employees generally includes the power to establish a mandatory age for retirement.[FN6] Federal, state, and local government programs or plans, often created by statute, which provide for compulsory retirement of public employees when they reach a designated age, have generally withstood challenges that such plans violated constitutional guaranties of due process[FN7] or equal protection[FN8] and claims that such plans impaired constitutional contractual rights.[FN9] The test sometimes applied by the courts in determining the validity of a mandatory retirement program under the equal protection clause of the Fourteenth Amendment, based on age, is whether, in the particular circumstances, a classification based solely on chronological age appears to be reasonable and rationally related to a proper and legitimate state interest.[FN10]

Not all mandatory retirement plans or systems have passed constitutional muster, and a mandatory retirement requirement imposed on public school teachers at a specified age has been held to violate equal protection where the court believed there was no rational reason for the legislature to relate advancing age to the mental fitness to teach.[FN11] However, this decision was criticized for too narrowly conceiving the possible rational bases for a compulsory retirement statute.[FN12]

A retirement policy that mandates retirement at a specified age is invalid when it contravenes a statute setting a different mandatory retirement age.[FN13]

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[FN1] [Oklahoma State Election Bd. v. Coats, 1980 OK 65, 610 P.2d 776 \(Okla. 1980\).](#)

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[FN2] [29 U.S.C.A. §§ 621 et seq.](#), as discussed, generally in [Am. Jur. 2d, Job Discrimination §§ 16, 17, 162, 165 to 167.](#)

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[\[FN3\] Am. Jur. 2d, Job Discrimination § 162.](#)

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[\[FN4\] Am. Jur. 2d, Job Discrimination § 891.](#)

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[\[FN5\] Am. Jur. 2d, Job Discrimination § 892.](#)

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[\[FN6\] Am. Jur. 2d, Pensions and Retirement Funds § 1194.](#)

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[\[FN7\] Kuhar v. Greensburg-Salem School Dist., 616 F.2d 676 \(3d Cir. 1980\); Grinnell v. State, 121 N.H. 823, 435 A.2d 523 \(1981\); Elliott v. Board of Trustees, Community College Dist. IX, 29 Wash. App. 890, 631 P.2d 985 \(Div. 1 1981\).](#)

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[\[FN8\] Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 \(1991\).](#)

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[\[FN9\] Monnier v. Todd County Independent School Dist., 245 N.W.2d 503 \(S.D. 1976\); Fazekas v. University of Houston, 565 S.W.2d 299 \(Tex. Civ. App. Houston 1st Dist. 1978\), writ refused n.r.e., \(Sept. 20, 1978\).](#)

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[\[FN10\] Nelson v. Miwa, 56 Haw. 601, 546 P.2d 1005, 81 A.L.R.3d 799 \(1976\).](#)

- As to the validity of legislative classifications generally, see [Am. Jur. 2d, Constitutional Law §§ 818, 819.](#)

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[\[FN11\] Gault v. Garrison, 569 F.2d 993 \(7th Cir. 1977\).](#)

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[\[FN12\] Issarescu v. Cleland, 465 F. Supp. 657 \(D.R.I. 1979\).](#)

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[\[FN13\] University of South Carolina v. Batson, 271 S.C. 242, 246 S.E.2d 882 \(1978\).](#)

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## § 163. Voluntariness; effect of duress or fraud

### West's Key Number Digest

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A retirement request initiated by a public employee is presumed to be a voluntary act.[FN1] A public employee's decision to retire is said to be voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make the choice, and is permitted to set the effective date.[FN2] The test for determining whether a public employee's retirement is voluntary is an objective one, requiring consideration of whether, under all the circumstances, the employee was prevented from exercising a reasonably free and informed choice.[FN3]

However, a public employee's retirement may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information.[FN4] To establish involuntariness on the basis of coercion an employee must show: (1) the agency effectively imposed the terms of the employee's retirement; (2) the employee had no realistic alternative but to retire; and (3) the employee's retirement was the result of improper acts by the agency.[FN5] The doctrine of coercive involuntariness does not apply to a case in which a public employee decides to retire because he or she does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that the employee feels that he or she has no realistic option but to leave.[FN6]

**Observation:** The fact that a public employee is faced with an inherently unpleasant situation[FN7] or that his or her choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice to retire involuntary.[FN8]

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[FN1] [Keyes v. District of Columbia](#), 372 F.3d 434 (D.C. Cir. 2004).

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[FN2] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN3] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN4] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN5] [Garcia v. Department of Homeland Security](#), 437 F.3d 1322 (Fed. Cir. 2006); [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN6] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN7] [Murphy v. U.S.](#), 69 Fed. Cl. 593 (2006), *aff'd* on other grounds, 223 Fed. Appx. 966 (Fed. Cir. 2007); [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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[FN8] [District of Columbia Metropolitan Police Dept. v. Stanley](#), 942 A.2d 1172 (D.C. 2008).

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**§ 164. Generally**

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The courts are without authority to create and declare a forfeiture of office.<sup>[FN1]</sup> In the absence of a forfeiture at common law, the forfeiture can be created and declared only by the constitution or a valid statute.<sup>[FN2]</sup> Any ambiguity in a constitutional provision calling for forfeiture of an existing office should be resolved in favor of continued eligibility.<sup>[FN3]</sup>

Statutes in some jurisdictions provide that certain public officers who knowingly or willingly misconduct themselves in office, or who knowingly or willfully neglect to perform any duty enjoined on such officers by any of the laws of the state, or who engage in public intoxication or any form of gambling, or who commit any act constituting a violation of any penal statute involving moral turpitude, must forfeit their office.<sup>[FN4]</sup> Even though the "good faith" of an officer can be a factor to be considered in determining whether the officer's actions constitute "misconduct" for purposes of such a statute, an intent or desire to benefit personally from an activity is not an essential element for such purposes.<sup>[FN5]</sup>

Some state constitutional provisions provide that any public officer or employee in the state who by virtue of his or her office or employment names or appoints to public office or employment any relative within a specified degree, by consanguinity or affinity, thereby forfeits his or her office or employment.<sup>[FN6]</sup> Such provision has been upheld as violating neither the due process or equal protection guarantees of the Federal Constitution.<sup>[FN7]</sup> Furthermore, such provision contains no scienter element, and, under the provision, the fact that the officer was competent to hold his or her public office or received no compensation for his or her work is irrelevant.<sup>[FN8]</sup>

The forfeiture of public office effected via resignation or removal precludes that person from serving in that office for the remainder of the term.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W.2d 941, 119 A.L.R. 710 \(1938\)](#) (holding modified on other grounds by, [State ex inf. Atty. Gen. v. Shull, 887 S.W.2d 397 \(Mo. 1994\)](#)).

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<sup>[FN2]</sup> [State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W.2d 941, 119 A.L.R. 710 \(1938\)](#) (holding modified on other grounds by, [State ex inf. Atty. Gen. v. Shull, 887 S.W.2d 397 \(Mo. 1994\)](#)).

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<sup>[FN3]</sup> [Helena Rubenstein Internat. v. Younger, 71 Cal. App. 3d 406, 139 Cal. Rptr. 473 \(2d Dist. 1977\)](#).

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[\[FN4\] State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[\[FN5\] State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[\[FN6\] State ex inf. Atty. Gen. v. Shull, 887 S.W.2d 397 \(Mo. 1994\)](#) (abrogated on other grounds by, [State v. Olvera, 969 S.W.2d 715 \(Mo. 1998\)](#)).

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[\[FN7\] State ex inf. Roberts v. Buckley, 533 S.W.2d 551 \(Mo. 1976\).](#)

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[\[FN8\] State ex inf. Atty. Gen. v. Shull, 887 S.W.2d 397 \(Mo. 1994\)](#) (abrogated on other grounds by, [State v. Olvera, 969 S.W.2d 715 \(Mo. 1998\)](#)).

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[\[FN9\] State ex rel. Nixon v. Wakeman, 271 S.W.3d 28 \(Mo. Ct. App. W.D. 2008\)](#), transfer denied, (Dec. 23, 2008).

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## **§ 165. Commission or conviction of crime**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [64](#)

While forfeiture of public office is a harsh penalty, it is the long-standing policy of the states not to retain criminal offenders in public service.[\[FN1\]](#) The purpose of a statute providing that any public officer or employee convicted of a felony must vacate the office or employment, and also forfeit the benefits of

employment if the offense violates the oath of office, is to ensure that public officials who commit serious criminal offenses, particularly those that violate their oath of office, lose their rights both to serve further and to the benefits of the office.[\[FN2\]](#) Disqualification from holding future public office or employment after a criminal conviction is limited to an offense involving or touching the convicted person's public office, position, or employment.[\[FN3\]](#) Whether a public employee's offense involves or touches public employment, so that forfeiture of public employment is mandatory, is a determination that must be made by the court, rather than being made by a prosecutor.[\[FN4\]](#)

**Observation:** Forfeiture of public employment is considered a civil penalty, which is a collateral consequence of a conviction.[\[FN5\]](#)

A statute providing that an office will be deemed vacant upon an officer's conviction of a crime involving a violation of his or her oath of office is applicable to misdemeanors, an element of which includes knowing or intentional conduct indicative of a lack of moral integrity.[\[FN6\]](#) If a public officer is convicted of a misdemeanor the elements of which constitute willful deceit, calculated disregard for honest dealings, intentional dishonesty or corruption of purpose, then an oath of office violation has occurred and the officer's position becomes vacant pursuant to statute, but if the misdemeanor for which the officer is convicted is not of such a nature, the officer is entitled to a hearing on the issue of appropriate discipline, which may include termination.[\[FN7\]](#)

**Practice Tip:** A statute governing forfeitures of benefits by public officers upon conviction of a felony must be strictly construed to limit forfeiture of the benefits of the office to offenses that by their very nature constitute a violation of the oath of office.[\[FN8\]](#)

A state provision for forfeiture of office will be applied to an officer convicted of a federal crime if the essence of the crime is an offense under state law.[\[FN9\]](#)

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[\[FN1\]](#) State v. Och, 371 N.J. Super. 274, 852 A.2d 1143, 189 Ed. Law Rep. 776 (App. Div. 2004).

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[\[FN2\]](#) Nida v. State ex rel. Oklahoma Public Employees Retirement System Bd. of Trustees, 2004 OK CIV APP 85, 99 P.3d 1224 (Div. 3 2004).

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[\[FN3\]](#) In re Forfeiture of Public Office of Nunez, 384 N.J. Super. 345, 894 A.2d 1176 (App. Div. 2006).

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[\[FN4\]](#) State v. Och, 371 N.J. Super. 274, 852 A.2d 1143, 189 Ed. Law Rep. 776 (App. Div. 2004).

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[\[FN5\]](#) State v. Och, 371 N.J. Super. 274, 852 A.2d 1143, 189 Ed. Law Rep. 776 (App. Div. 2004).

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[\[FN6\]](#) Feola v. Carroll, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219 (2008).

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[\[FN7\]](#) Feola v. Carroll, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219 (2008).

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[\[FN8\]](#) Stipe v. State ex rel. Bd. of Trustees of Oklahoma Public Employees Retirement System, 2008 OK 52, 188 P.3d 120 (Okla. 2008).

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[\[FN9\]](#) State ex inf. Peach v. Goins, 575 S.W.2d 175 (Mo. 1978); State v. Musto, 187 N.J. Super. 264, 454 A.2d 449 (Law Div. 1982), opinion aff'd, 188 N.J. Super. 106, 456 A.2d 114 (App. Div. 1983).

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**§ 166. Commission or conviction of crime—Necessity of adjudication, finding or plea of guilt, or sentencing; what constitutes "conviction"**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 64

**A.L.R. Library**

[What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139](#)

Before forfeiture of one's office will occur under some statutes for the commission of a crime, it is required that, at least, the officer's guilt be adjudged in a formal proceeding in which he or she was accorded due process of law.[[FN1](#)] A "conviction," as applied to a constitutional provision calling for forfeiture of an existing office, has been said to consist of guilt followed by a judgment upholding and implementing such verdict or finding.[[FN2](#)] Further, statutes in some states providing for the forfeiture of public office or employment upon the conviction of the officer or employee of certain crimes, specifically provide that the forfeiture is to take effect: upon a finding of guilt by the trier of fact or a plea of guilty, if the court so ordered; or upon sentencing, unless the court, for good cause shown, ordered a stay of such forfeiture.[[FN3](#)]

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[[FN1](#)] [Johnson v. Johnson, 1967 OK 16, 424 P.2d 414 \(Okla. 1967\).](#)

[\[FN2\] Helena Rubenstein Internat. v. Younger, 71 Cal. App. 3d 406, 139 Cal. Rptr. 473 \(2d Dist. 1977\).](#)

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[\[FN3\] Moore v. Youth Correctional Institute at Annandale, 119 N.J. 256, 574 A.2d 983 \(1990\).](#)

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## **§ 167. Commission or conviction of crime—Effect of pending appeal from or reversal of conviction**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [64](#)

An appeal from a conviction generally has no effect on, and does not avoid the forfeiture of, a public office.[\[FN1\]](#) In the event of reversal of a conviction, however, the officer would automatically be revested in the office and the term of any interim successor, whether appointive or elective, would come to an end at the same time.[\[FN2\]](#) The reason is that a decree of forfeiture of a public office that is reversed on appeal becomes a nullity, so that no proceedings are necessary to restore the right and title to the office.[\[FN3\]](#) Forfeiture of public employment is a "collateral consequence" of a criminal conviction, which is eliminated by an order of expungement, and a criminal conviction that the legislature has directed shall be deemed not to have occurred cannot provide a foundation for a forfeiture of public office or employment.[\[FN4\]](#)

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[\[FN1\] Coates v. City of Evansville, 149 Ind. App. 518, 273 N.E.2d 862 \(1971\); State v. DeGeorge, 171 Mont. 531, 560 P.2d 138 \(1976\); Hayes v. Hudson County Bd. of Chosen Freeholders, 116 N.J. Super. 21, 280 A.2d 838 \(App. Div. 1971\).](#)

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[\[FN2\] Hayes v. Hudson County Bd. of Chosen Freeholders, 116 N.J. Super. 21, 280 A.2d 838 \(App. Div. 1971\).](#)

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[\[FN3\] Board of County Com'rs of Oklahoma County v. Litton, 1957 OK 139, 315 P.2d 239, 64 A.L.R.2d 1365 \(Okla. 1957\).](#)

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[\[FN4\] In re Forfeiture of Public Office of Nunez, 384 N.J. Super. 345, 894 A.2d 1176 \(App. Div. 2006\).](#)

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) [1183](#), [1475\(9\)](#), [1947](#)

West's Key Number Digest, [Officers and Public Employees](#) [60](#), [66](#), [69.1](#), [69.2](#), [69.7](#), [69.11](#), [70](#), [71](#)

### Primary Authority

[5 U.S.C.A. § 7532](#)

[18 U.S.C.A. §§ 1901](#), [1912](#), [2071\(b\)](#)

## **A.L.R. Library**

A.L.R. Index, Public Officers and Employees

West's A.L.R. Digest, [Constitutional Law](#) 1183, 1475(9), 19477

West's A.L.R. Digest, [Officers and Public Employees](#) 60, 666, 69.11, 69.22, 69.77, 69.111, 700, 711

## **Trial Strategy**

[Constructive Discharge—Employee's Resignation Due to Intolerable Working Conditions as Tantamount to Discharge, 33 Am. Jur. Proof of Facts 3d 235](#)

[Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech, 22 Am. Jur. Proof of Facts 3d 203](#)

[Wrongful Discharge—Bad Faith Dismissal of At-Will Employee, 48 Am. Jur. Proof of Facts 2d 183](#)

## **Forms**

[Am. Jur. Legal Forms 2d § 213:54](#)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 25, 54](#)

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**§ 168. Generally**

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West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.1](#)

**A.L.R. Library**

[Who are "Public Employers" or "Public Employees" Within the Meaning of State Whistleblower Protection Acts, 90 A.L.R.5th 687](#)

**Trial Strategy**

[Constructive Discharge—Employee's Resignation Due to Intolerable Working Conditions as Tantamount to Discharge, 33 Am. Jur. Proof of Facts 3d 235](#)

**Forms**

[Am. Jur. Legal Forms 2d § 213:54](#) (Notice of removal of public officer)

A fundamental principle associated with our republican form of government is that every public office holder remains in the position at the sufferance and for the benefit of the public, subject to removal from office by edict at the ballot box at the time of the next election, or before that time by any other constitutionally permissible means.<sup>[FN1]</sup> The grant of power to remove an officer for specified causes, without provision for effectuation, carries with it, as incident to the grant, all means necessary to effectuate the power.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Tarrant County v. Ashmore, 635 S.W.2d 417 \(Tex. 1982\).](#)

- As to the recall of elected public officials, see [§§ 200 et seq.](#)
- As to impeachment of public officials, see [§§ 213 et seq.](#)
- As to removal of various officers, see for example, [Am. Jur. 2d, Clerks of Court § 9](#); [Am. Jur. 2d, Judges §§ 16 et seq.](#); [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 264 et seq.](#)
- As to separation from employment under civil service laws, see [Am. Jur. 2d, Civil Service §§ 50 et seq.](#)
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<sup>[FN2]</sup> [Rockefeller v. Hogue, 244 Ark. 1029, 429 S.W.2d 85 \(1968\).](#)

- As to particular grounds for dismissal or removal of a public employee or officer, see [§§ 172 et seq.](#)
- As to proceedings for removal, see [§§ 439 et seq.](#)
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**§ 169. Authority for dismissal or removal; compliance with applicable provisions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.1](#), [69.7](#)

The legislative power extends to the subject of regulating removals from office.[FN1] Furthermore, a state constitutional provision may govern removal of public officers.[FN2] Where the constitution prescribes the method of removal and the causes for which public officers may be removed, the method and grounds established by this instrument are exclusive, and it is beyond the power of the legislature to remove incumbents in any other manner or for any other cause.[FN3]

Generally legislatures are free to alter the methods for removal of public officers.[FN4] The courts, however, have no inherent power to remove elected or executive officers.[FN5] Furthermore, a court of equity has no general jurisdiction to remove public officers.[FN6]

The power to remove a public officer has been characterized as executive in nature.[FN7]

Governmental bodies must comply with the applicable statutory enactments in connection with the discharge of employees employed by such bodies.[FN8] Furthermore, where employment termination is involved, substantial violations by an administrative agency responsible for the termination of its own personnel rules render a dismissal invalid.[FN9]

**Observation:** A municipal council is generally considered as having the inherent or incidental power to expel one of its own members.[FN10]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Under California law, employment contract can expand preremoval rights of government employee and give rise to protectible property interest. [U.S.C.A. Const.Amend. 14. Flores v. Von Kleist, 739 F. Supp. 2d 1236 \(E.D. Cal. 2010\).](#)

**[END OF SUPPLEMENT]**

[FN1] [State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321 \(1935\); Bodmer v. Police Mut. Aid Ass'n, 94 Utah 450, 78 P.2d 640 \(1938\).](#)

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[FN2] [Municipal Court of Seattle ex rel. Tuberg v. Beighle, 96 Wash. 2d 753, 638 P.2d 1225 \(1982\).](#)

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[FN3] [State ex rel. De Concini v. Sullivan, 66 Ariz. 348, 188 P.2d 592 \(1948\); State ex inf. Shartel v. Brunk, 326 Mo. 1181, 34 S.W.2d 94 \(1930\); Mulholland v. Ayers, 109 Mont. 558, 99 P.2d 234 \(1940\); State v. Kohler, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348 \(1930\).](#)

- A state constitutional provision, stating that all civil officers hold their offices on the condition that they behave themselves well while in office and must be removed on conviction of misbehavior in office or of any infamous crime, contemplates an affirmative limitation (good behavior) upon removal, and thus, the authority to remove such officers cannot be said to be absolute. [Burger v. School Bd. of McGuffey School Dist., 592 Pa. 194, 923 A.2d 1155, 220 Ed. Law Rep. 744 \(2007\).](#)

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[FN4] [McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 322 N.E.2d 758 \(1975\); Power v. Secretary of Dept. of Community Affairs, 7 Mass. App. Ct. 409, 388 N.E.2d 304 \(1979\).](#)

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[FN5] [In re Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, 118 A.L.R. 166 \(1938\).](#)

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[FN6] [Walton v. House of Representatives of State of Okl., 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 \(1924\).](#)

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[FN7] [State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 \(1934\); In re Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, 118 A.L.R. 166 \(1938\).](#)

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[FN8] [Thurston v. Box Elder County, 835 P.2d 165 \(Utah 1992\).](#)

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[FN9] [Appeal of Gielen, 139 N.H. 283, 652 A.2d 144 \(1994\).](#)

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[FN10] [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 131.](#)

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**§ 170. Removal as incident of right of appointment**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 60, 71

When the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint.<sup>[FN1]</sup> Accordingly, the power to dismiss does not generally lie with other than the appointing officer,<sup>[FN2]</sup> though a person holding lawfully delegated authority may properly be empowered to appoint and dismiss.<sup>[FN3]</sup> Under a statute providing that an appointee may be removed by the officer or body making the appointment, an appointee may be so removed without the concurrence of the government body that was required by statute to confirm the appointment.<sup>[FN4]</sup>

An implied power of summary removal of a public officer is not incident to the power of appointment of such officer where the extent of the term of office is fixed by statute.<sup>[FN5]</sup>

Recognizing that the power of approving a person appointed by another does not include the power to discharge that appointee, a court has taken the view that a senate or board does not, by virtue of its power of confirmation, acquire the power to discharge officials appointed by the chief executive or appointing official and confirmed by the senate or board.<sup>[FN6]</sup> Another view is that a public officer appointed by the Governor by and with the advice and consent of the senate is removable only by the senate, except as otherwise provided by special provisions of law.<sup>[FN7]</sup> Bias on the part of members of the appointing authority does not prevent the authority from exercising its power to remove an employee.<sup>[FN8]</sup>

As with the power to remove officers, the power to hire an employee generally carries with it the implied power to fire, subject to express provisions limiting the power to fire, as, for example, "for cause."<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Richman v. Straley](#), 48 F.3d 1139 (10th Cir. 1995); [Melendez v. Board of Educ. of Yonkers City School Dist.](#), 34 A.D.3d 814, 828 N.Y.S.2d 67, 215 Ed. Law Rep. 1049 (2d Dep't 2006); [State ex rel. Minor v. Eschen](#), 74 Ohio St. 3d 134, 1995-Ohio-264, 656 N.E.2d 940 (1995).

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<sup>[FN2]</sup> [Bosco v. Oneida County](#), 106 Misc. 2d 872, 435 N.Y.S.2d 876 (Sup 1980), judgment aff'd, [79 A.D.2d 1092](#), 436 N.Y.S.2d 1021 (4th Dep't 1981).

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<sup>[FN3]</sup> [Tomlin v. Personnel Appeal Bd.](#), 177 Conn. 344, 416 A.2d 1205 (1979).

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[\[FN4\] LaPeters v. City of Cedar Rapids, 263 N.W.2d 734 \(Iowa 1978\).](#)

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[\[FN5\] State ex rel. Doherty v. Finnegan, 25 Conn. Supp. 390, 206 A.2d 477 \(Super. Ct. 1964\); Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 \(1963\).](#)

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[\[FN6\] Richmond County v. Jackson, 234 Ga. 717, 218 S.E.2d 11 \(1975\).](#)

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[\[FN7\] Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 \(Ct. Cl. 1977\).](#)

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[\[FN8\] Wilson v. Brookline Housing Authority, 383 Mass. 878, 420 N.E.2d 314 \(1981\).](#)

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[\[FN9\] Richmond County v. Jackson, 234 Ga. 717, 218 S.E.2d 11 \(1975\).](#)

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## **§ 171. Removal by legislation or redistricting**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [69.11](#), [70](#)

It has been said that without abolishing the office,[\[FN1\]](#) the legislature may, before the expiration of the term of the incumbent, legislate the incumbent out of office by incorporating the duties of his or her position into that of another position,[\[FN2\]](#) or may legislate the officer out of one and into another office.[\[FN3\]](#)

Removal from office as a result of redistricting has been held not to deprive an incumbent of procedural due process where there was notice and a public meeting on the matter.[FN4]

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[FN1] As to abolition of public offices, generally, see [§§ 44 et seq.](#)

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[FN2] [Conneaut v. Wiley, 82 Ohio App. 3d 155, 611 N.E.2d 497 \(11th Dist. Ashtabula County 1992\).](#)

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[FN3] [State ex rel. Hammond v. Maxfield, 103 Utah 1, 132 P.2d 660 \(1942\).](#)

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[FN4] [Tarrant County v. Ashmore, 635 S.W.2d 417 \(Tex. 1982\).](#)

- As to hearing and notice generally required in removal proceedings, see [§§ 439 et seq.](#)

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(1) In General

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**§ 172. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.1](#), [69.7](#)

**Trial Strategy**

The removal of a public official is not to be ordered lightly for minor or isolated infractions.[FN1] Absent willful misconduct, technical violations of a statute or of one's official duty do not always justify an officer's removal.[FN2]

Where the constitution of a state designates the grounds for which an officer may be removed from office, the legislature cannot add to the list.[FN3] Also, where a statute provides that an officer may be removed for certain specified causes, the order of removal must be based on some one or all of such causes, and may not be made for other causes.[FN4] The remedy by the removal of a public officer has been said to be a drastic one, and a statutory provision defining the grounds for removal is given a strict construction.[FN5]

In general, a person cannot be removed from government employment because of factors totally unconnected with the responsibilities of that employment.[FN6]

So long as it is not based upon a constitutionally impermissible reason, a decision to terminate the employment of a public officer or employee does not raise any issue of arbitrariness.[FN7]

A central feature of some state personnel systems is the principle that persons within the system can be subjected to discharge only for just cause.[FN8] On the other hand, government agencies have broad discretion in the discharge of employees who are terminable at will, and may dismiss such employees without cause, and absent a violation of constitutional rights, judicial review is not available to second-guess the firing of an employee who is terminable at will.[FN9]

In discharge cases, an agency has discretion to determine if an employee's conduct is detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for the employee's no longer holding the position.[FN10]

While administrative rules unquestionably may form the jurisdictional basis for the termination of a government employee, such an action is allowable only where persons of common intelligence are not required to guess at their meaning and where the employee subject to discipline was properly apprised that his or her conduct was proscribed by the rule.[FN11]

**Observation:** The merit principle, as expressed in some state constitutions, ordinarily allows state agencies broad discretion to eliminate positions[FN12] and order layoffs for reasons of efficiency and economy, provided that their decisions are not politically motivated.[FN13]

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[FN1] In re Removal of Kuehnle, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 (12th Dist. Madison County 2005).

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[FN2] State ex rel. Crowder v. Smith, 232 Iowa 254, 4 N.W.2d 267 (1942).

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[FN3] § 169.

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[FN4] State ex rel. Ayer v. Ewing, 231 Ind. 1, 106 N.E.2d 441 (1952); State ex rel. Joos v. Guy, 125 N.W.2d 468 (N.D. 1963).

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[FN5] State on Information of Connett v. Madget, 297 S.W.2d 416 (Mo. 1956); Matter of Boso, 160 W. Va. 38, 231 S.E.2d 715 (1977).

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[FN6] Hetherington v. State Personnel Bd., 82 Cal. App. 3d 582, 147 Cal. Rptr. 300 (3d Dist. 1978).

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[FN7] Roberts v. Fayette County Bd. of Educ., 173 S.W.3d 918, 203 Ed. Law Rep. 388 (Ky. Ct. App. 2005).

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[FN8] [Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen](#), 886 P.2d 700 (Colo. 1994); [York v. Civil Service Com'n](#), 263 Mich. App. 694, 689 N.W.2d 533 (2004).

- As to grounds for removal, suspension, or demotion of civil service employees, generally, see [Am. Jur. 2d, Civil Service §§ 63 et seq.](#)

- An appointing authority may dismiss any permanent employee in the classified service when it considers that the good of the service will be served thereby. [Jones v. Kansas State University](#), 279 Kan. 128, 106 P.3d 10, 195 Ed. Law Rep. 645 (2005).

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[FN9] [Widder v. Durango School Dist. No. 9-R](#), 85 P.3d 518, 185 Ed. Law Rep. 1012 (Colo. 2004), as modified on denial of reh'g, (Mar. 15, 2004).

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[FN10] [Bono v. Chicago Transit Authority](#), 379 Ill. App. 3d 134, 318 Ill. Dec. 119, 882 N.E.2d 1242 (1st Dist. 2008).

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[FN11] [Williams v. Miami-Dade County, Florida](#), 969 So. 2d 389 (Fla. Dist. Ct. App. 3d Dist. 2007).

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[FN12] [§ 44.](#)

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[FN13] [Moore v. State, Dept. of Transp. and Public Facilities](#), 875 P.2d 765 (Alaska 1994).

- As to temporary layoffs based on economic or financial reasons, see [§ 221.](#)

- As to change of status, separation, and reinstatement under civil service laws, see [Am. Jur. 2d, Civil Service §§ 50 et seq.](#)

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**§ 173. Effect of term of office fixed by law; staggered expiration dates of terms**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, [69.1](#), [69.2](#), [69.7](#)

In the absence of any provision for summary removal, appointments to continue for life or during good behavior[[FN1](#)]<sup>—</sup>which in contemplation of law is for a fixed term[[FN2](#)]<sup>—</sup>or for a fixed term of years[[FN3](#)] cannot be terminated except for cause. Moreover, an individual appointed to a post for a fixed term that may extend beyond the life of the appointing body may be removed prior to the term's expiration only for cause.[[FN4](#)] It is the fixity of the term that destroys the power of removal at pleasure.[[FN5](#)] For the purposes of this rule, the term of persons appointed to fill vacancies in office is considered definite, when it is provided that they will hold until the next general election and the qualification of their successors.[[FN6](#)]

Staggered expiration dates for officers in an administrative agency indicate that the members are not removable by the appointer at his or her pleasure, without express provisions to that effect.[[FN7](#)]

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[[FN1](#)] [Gowey v. Siggelkow](#), 85 Idaho 574, 382 P.2d 764 (1963).

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[[FN2](#)] [§ 144](#).

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[[FN3](#)] [Humphrey's Ex'r v. U.S.](#), 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

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[[FN4](#)] [Cabarle v. Governing Body of Pemberton Tp.](#), 167 N.J. Super. 129, 400 A.2d 548 (Law Div. 1979), judgment aff'd, [171 N.J. Super. 586](#), 410 A.2d 281 (App. Div. 1980).

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[[FN5](#)] [Humphrey's Ex'r v. U.S.](#), 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

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[[FN6](#)] [Gowey v. Siggelkow](#), 85 Idaho 574, 382 P.2d 764 (1963).

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[[FN7](#)] [Bowers v. Pennsylvania Labor Relations Bd.](#), 402 Pa. 542, 167 A.2d 480 (1961).

- As to members and officers of administrative agencies, generally, see [Am. Jur. 2d, Administrative Law §§ 34 et seq.](#)

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**§ 174. Effect of failure of legislature to designate term; removal at will or pleasure**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.1, 69.7, 71

With regard to offices created to be filled by appointment, if the legislature does not designate the term of the office, the appointee may be removed at the pleasure of the appointing authority.<sup>[FN1]</sup> This rule applies even though the appointing power attempts to fix a definite term.<sup>[FN2]</sup> Where the tenure of appointment is unlimited or indefinite, the power to remove at will may be implied, the removal thus becoming solely a manner of executive discretion.<sup>[FN3]</sup> This implied power to remove may not be contracted away so as to bind the appointing authority to retain a minor officer for a definite period.<sup>[FN4]</sup>

Statutes sometimes provide that certain officers will, within the tenure prescribed, be removable at pleasure.<sup>[FN5]</sup>

Public employers retain wide latitude in hiring and firing employees who serve in at-will, statutorily-created positions.<sup>[FN6]</sup> Public employees are not necessarily terminable at will,<sup>[FN7]</sup> although an at-will government employee may be terminated for cause or for no cause whatsoever.<sup>[FN8]</sup> Public employees generally serve at the pleasure of their employer and thus have no legitimate entitlement to continued employment.<sup>[FN9]</sup>

**Observation:** A "class of one" equal protection claim, under which the plaintiff alleges that he or she has been treated differently from other similarly situated persons without any rational basis, but does not allege that the differential treatment was due to the plaintiff's membership in a particular class, is not cognizable in the public employment context, as employment decisions are often subjective and individualized, and government employment, absent legislation, is at-will.<sup>[FN10]</sup>

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<sup>[FN1]</sup> [Gowey v. Siggelkow](#), 85 Idaho 574, 382 P.2d 764 (1963); [Eads v. City of Boulder City](#), 94 Nev. 735, 587 P.2d 39 (1978); [Jones v. Bayless](#), 1953 OK 92, 208 Okla. 270, 255 P.2d 506 (1953).

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<sup>[FN2]</sup> [Gowey v. Siggelkow](#), 85 Idaho 574, 382 P.2d 764 (1963); [State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County](#), 122 Mont. 464, 206 P.2d 166 (1949).

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[\[FN3\] State ex rel. Raslavsky v. Bonvouloir, 167 Conn. 357, 355 A.2d 275 \(1974\).](#)

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[\[FN4\] Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 \(1963\); State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 206 P.2d 166 \(1949\).](#)

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[\[FN5\] Stetson v. Board of Selectmen of Carlisle, 369 Mass. 755, 343 N.E.2d 382 \(1976\).](#)

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[\[FN6\] Potente v. County of Hudson, 378 N.J. Super. 40, 874 A.2d 580 \(App. Div. 2005\), judgment rev'd on other grounds, 187 N.J. 103, 900 A.2d 787 \(2006\).](#)

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[\[FN7\] Zerbetz v. Alaska Energy Center, 708 P.2d 1270 \(Alaska 1985\).](#)

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[\[FN8\] Segal v. City of New York, 459 F.3d 207, 212 Ed. Law Rep. 21 \(2d Cir. 2006\).](#)

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[\[FN9\] Elmore v. Cleary, 399 F.3d 279 \(3d Cir. 2005\)](#) (under Pennsylvania law).

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[\[FN10\] Engquist v. Oregon Dept. of Agr., 128 S. Ct. 2146, 170 L. Ed. 2d 975 \(2008\).](#)

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**§ 175. Effect of failure of legislature to designate term; removal at will or pleasure—Dismissal for exercise of constitutionally protected right**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

A public employee who is serving at the pleasure of the appointing authority and is subject to removal without judicially recognized good cause may not be dismissed as a result of the exercise of a constitutionally protected right,[\[FN1\]](#) such as the right to free speech.[\[FN2\]](#) However, statutes providing that public employees "may freely participate in any political activity and express any political opinion," do not prohibit a government employer from firing an at-will employee if the employer does not have the utmost confidence in the employee's ability to carry out the employer's policies.[\[FN3\]](#)

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[\[FN1\] McCormick v. Edwards, 646 F.2d 173 \(5th Cir. 1981\); Abel v. Cory, 71 Cal. App. 3d 589, 139 Cal. Rptr. 555 \(3d Dist. 1977\); Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 \(1981\).](#)

[\[FN2\] Wilderman v. Nelson, 467 F.2d 1173 \(8th Cir. 1972\); Simmons v. Stanton, 502 F. Supp. 932 \(W.D. Mich. 1980\).](#)

- As to actions for wrongful discharge based on the retaliatory discharge of a public employee's exercise of free speech, generally, see [Am. Jur. 2d, Wrongful Discharge § 79](#).

[\[FN3\] Newell v. Runnels, 407 Md. 578, 967 A.2d 729 \(2009\).](#)

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## § 176. Infringement of constitutional rights

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

### A.L.R. Library

[What Constitutes Activity of Employee, Other than "Reporting" Wrongdoing, Protected Under State Whistleblower Protection Statute, 13 A.L.R.6th 499](#)

[Who are "Public Employers" or "Public Employees" Within the Meaning of State Whistleblower Protection Acts, 90 A.L.R.5th 687](#)

### Trial Strategy

[Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech, 22 Am. Jur. Proof of Facts 3d 203](#)

A public employee may not be dismissed for a reason that violates his or her constitutional rights.[FN1] Thus, a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interests under the First Amendment[FN2] to freedom of speech[FN3] or association,[FN4] his or her Fifth Amendment privileges against self-incrimination, or when he or she is dismissed for reasons of racial bias.[FN5]

Public employees cannot be discharged simply because they invoke their privilege under the Fifth Amendment not to incriminate themselves in refusing to respond to questions propounded by their employers.[FN6] However, public employees can be discharged for refusing to answer questions narrowly drawn and specifically related to their job performance, where the answers cannot be used against them in a criminal proceeding.[FN7]

**Practice Tip:** For a public employee to establish that the employer conditioned his or her job in a way that impermissibly burdened a constitutional right, the employee must first demonstrate that the asserted right is protected by the Constitution and that he or she suffered an adverse employment action for exercising that right, and once the employee makes these two showings, the employee is entitled to prevail if the adverse employment action was taken in such a way as to infringe the constitutionally protected right.[FN8]

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[FN1] [Wagner v. Wheeler, 13 F.3d 86 \(4th Cir. 1993\)](#); [Dixon v. Osman, 22 Ariz. App. 430, 528 P.2d 181 \(Div. 1 1974\)](#); [English v. College of Medicine and Dentistry of New Jersey, 73 N.J. 20, 372 A.2d 295 \(1977\)](#); [Zaretsky v. New York City Health and Hospitals Corp., 84 N.Y.2d 140, 615 N.Y.S.2d 341, 638 N.E.2d 986 \(1994\)](#).

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[FN2] [Plano v. Baker, 504 F.2d 595 \(2d Cir. 1974\)](#).

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[FN3] [§ 197](#).

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[FN4] [Galaway v. Lawson](#), 438 F. Supp. 968 (D. Minn. 1976), judgment aff'd, [565 F.2d 542 \(8th Cir. 1977\)](#).

- As to discharge or removal for political activities of a public officer or employee, generally, see [§ 188](#).

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[FN5] [Galaway v. Lawson](#), 438 F. Supp. 968 (D. Minn. 1976), judgment aff'd, [565 F.2d 542 \(8th Cir. 1977\)](#).

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[FN6] [Furtado v. Town of Plymouth](#), 69 Mass. App. Ct. 319, 867 N.E.2d 801 (2007), review granted, [449 Mass. 1109, 873 N.E.2d 247 \(2007\)](#) and aff'd, [451 Mass. 529, 888 N.E.2d 357 \(2008\)](#).

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[FN7] [Furtado v. Town of Plymouth](#), 69 Mass. App. Ct. 319, 867 N.E.2d 801 (2007), review granted, [449 Mass. 1109, 873 N.E.2d 247 \(2007\)](#) and aff'd, [451 Mass. 529, 888 N.E.2d 357 \(2008\)](#).

- Incriminating answers given by a public employee under threat of job sanction for refusal to answer may themselves form the basis for job discipline, including termination, so long as the employee has requisite protection against the criminal use of such statements under the constitutional privilege against compelled self-incrimination. [Spielbauer v. County of Santa Clara](#), 45 Cal. 4th 704, 88 Cal. Rptr. 3d 590, 199 P.3d 1125 (2009), petition for cert. filed, [77 U.S.L.W. 3635 \(U.S. May 5, 2009\)](#).

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[FN8] [Akins v. Fulton County, Ga.](#), 420 F.3d 1293 (11th Cir. 2005).

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**§ 177. Willfulness of conduct**

**West's Key Number Digest**

In fixing the grounds for the removal of public officers, the constitution or the legislature may require that prohibited acts be done willfully in order that they may amount to causes for removal.[FN1] For example, officers may be removable for willful misconduct in office.[FN2] The word "willful" in this connection implies knowledge on the part of the officer, together with a purpose to do wrong.[FN3] Conduct may be voluntary, thoughtless, or even reckless, without necessarily being willful.[FN4]

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[FN1] [State v. Naumann, 213 Iowa 418, 239 N.W. 93, 81 A.L.R. 483 \(1931\).](#)

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[FN2] [§ 196.](#)

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[FN3] [State v. Naumann, 213 Iowa 418, 239 N.W. 93, 81 A.L.R. 483 \(1931\).](#)

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[FN4] [Shields v. State, 1939 OK 203, 184 Okla. 618, 89 P.2d 756 \(1939\).](#)

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**§ 178. Generally**

**West's Key Number Digest**

## A.L.R. Library

### [Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691](#)

According to some authorities, a public officer may not be removed for acts committed before his or her entry into office.[\[FN1\]](#)

However, in some instances, the type of misconduct charged against a public officer,[\[FN2\]](#) or the particular office in which he or she was serving when charges were brought against him or her,[\[FN3\]](#) have been considered in determining the propriety of removing the officer for acts committed in a prior term of office.

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[\[FN1\]](#) *Smith v. Godby*, 154 W. Va. 190, 174 S.E.2d 165, 42 A.L.R.3d 675 (1970).

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[\[FN2\]](#) *State v. Millhaubt*, 144 Kan. 574, 61 P.2d 1356 (1936); *Matter of Carrillo*, 542 S.W.2d 105 (Tex. 1976).

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[\[FN3\]](#) *Letcher v. Com. ex rel. Matthews*, 414 S.W.2d 402 (Ky. 1966); *Matter of Carrillo*, 542 S.W.2d 105 (Tex. 1976); *Smith v. Godby*, 154 W. Va. 190, 174 S.E.2d 165, 42 A.L.R.3d 675 (1970).

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## § 179. Effect of statutes specifically authorizing or prohibiting removal

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 66

### A.L.R. Library

[Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691](#)

Statutes have sometimes specifically prohibited the removal of public officers based on misconduct that occurred in a prior term of office, although the prohibition may be limited to civil removal proceedings.[FN1] Statutes which have prohibited the removal of officers for conduct prior to their taking office have sometimes been said to embody what has been called the "forgiveness doctrine." [FN2] The principal rationale of the prior term rule, which generally prohibits a public officer from being removed from office for misconduct occurring during a previous term of the office, is that reelection or reappointment of the officer amounts to condonation of his or her prior misconduct.[FN3] Another type of removal statute has authorized the removal of public officers guilty of misconduct and provides additionally that officers so removed are disqualified or ineligible to hold public office in the future, either indefinitely or for a term of years, and in construing this type of provision, misconduct in a prior term of office has been deemed to justify removing the guilty officer from his or her current office.[FN4]

**Caution:** When an individual's pre-election conduct disqualifies the individual from holding office, that conduct cannot be forgiven by the electorate, under the forgiveness doctrine.[FN5]

Where applicable statutes exist, the propriety of removal for conduct occurring prior to one's term of office is governed by the wording of the particular statutory provision.[FN6]

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[FN1] [In re Bazan, 251 S.W.3d 39 \(Tex. 2008\).](#)

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[FN2] [Matter of Bates, 555 S.W.2d 420 \(Tex. 1977\).](#)

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[FN3] [State ex rel. Stovall v. Meneley, 271 Kan. 355, 22 P.3d 124 \(2001\).](#)

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[FN4] [Letcher v. Com. ex rel. Matthews, 414 S.W.2d 402 \(Ky. 1966\).](#)

- As to removal from office as affecting eligibility for office in the future, generally, see [§ 82](#).

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[FN5] [In re Bazan, 251 S.W.3d 39 \(Tex. 2008\).](#)

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[FN6] [In re Coppola, 155 Ohio St. 329, 44 Ohio Op. 313, 98 N.E.2d 807 \(1951\).](#)

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## **§ 180. Rule where statutes are silent as to applicable term**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66

### **A.L.R. Library**

[Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691](#)

Some courts take the view that, under statutory provisions that merely authorize removal as the penalty for official misconduct and do not refer in any way to the term of office in which the misconduct must occur to justify removal of this type, misconduct committed in a prior term cannot justify the removal of a public officer from his or her current term of office.[FN1] In a jurisdiction recognizing this general rule, misconduct committed by an official after election but prior to his or her assumption of office may, however, be considered as a ground for removal where the alleged misconduct arises out of the official-elect's exercise of his or her anticipated authority relative to and under circumstances reasonably invoking a response from others to the privilege or authority asserted.[FN2] Furthermore, a public officer may not be removed from office for misconduct that he or she committed in another public office or in a prior term of office if there is no disqualification to hold office in the future because of such misconduct.[FN3]

Other courts with statutory and constitutional provisions that merely authorize removal for official misconduct and do not refer in any way to the term of office in which the misconduct must occur to justify removal have subscribed to the general rule that misconduct occurring in a prior term of office may constitute grounds for removing the guilty public officer from his or her present term of office where the penalty of removal is justified by the circumstances of the case.[FN4] In some cases, courts have justified the removal of a public officer for misconduct in a prior term of office at least partially upon the fact that the misconduct alleged has continued into the present term of office.[FN5]

The term "in office," as contained within a statutory provision authorizing the removal of a public officer guilty of misconduct in office, has been defined variously as relating to a single term of office, as well as to an entire tenure of office encompassing several terms.[FN6] Also, the term "for cause" has been interpreted to include misconduct committed in a previous term of office.[FN7]

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[FN1] [State ex rel. Doyle v. Benda, 319 N.W.2d 264, 4 Ed. Law Rep. 618 \(Iowa 1982\)](#) (involving removal statute); [State v. Santillanes, 99 N.M. 89, 654 P.2d 542 \(1982\)](#) (involving removal statute); [Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 \(1975\)](#) (involving constitutional removal provision).

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[FN2] [Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 \(1975\)](#).

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[FN3] [State ex rel. Turner v. Earle, 295 So. 2d 609 \(Fla. 1974\)](#).

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[FN4] [In re Rome, 218 Kan. 198, 542 P.2d 676 \(1975\)](#); [Phillips v. Dally, 143 A.D.2d 273, 532 N.Y.S.2d 32 \(2d Dep't 1988\)](#).

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[FN5] [State ex rel. Londerholm v. Schroeder, 199 Kan. 403, 430 P.2d 304 \(1967\)](#).

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[FN6] [State ex rel. Stokes v. Probate Court of Cuyahoga County, 22 Ohio St. 2d 120, 51 Ohio Op. 2d 180, 258 N.E.2d 594 \(1970\)](#).

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[FN7] [Sarisohn v. Appellate Division of Supreme Court, Second Judicial Dept., 21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276 \(1967\)](#).

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**§ 181. Removal or discharge for "cause" or "just cause"**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 54](#) (Complaint, petition, or declaration—  
For breach of employment contract—Discharge of public employee without cause)

Instead of enumerating specific causes for the removal of public officers, their superiors in authority may be empowered to remove them for "cause." [\[FN1\]](#) A provision that permanent state employees cannot be fired without just cause may be imposed under a collective bargaining agreement. [\[FN2\]](#)

"Cause" is a flexible concept that relates to an employee's qualifications and implicates the public interest. [\[FN3\]](#) Cause for discharge has been defined as some substantial shortcoming that renders the person's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public policy recognize as good cause for no longer holding the position. [\[FN4\]](#) As sometimes stated, dismissal "for cause" is appropriate when an employee's conduct affects his or her ability and fitness to perform his or her duties. [\[FN5\]](#) The phrase "for cause" in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, [\[FN6\]](#) and not merely cause which the appointing power in the exercise of discretion may deem sufficient. [\[FN7\]](#) Relatively minor acts of misconduct are insufficient to warrant removal or discharge for cause, [\[FN8\]](#) as cause implies a reasonable ground for removal as distinguished from a frivolous or incompetent ground. [\[FN9\]](#) Cause must be one which specifically relates to and affects the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. [\[FN10\]](#) To be sufficient to constitute just cause for removal from employment, the cause should be personal to the employee and such as to render the employee unfit for the position he or she occupies, thus making the employee's dismissal justifiable and for the good of the service. [\[FN11\]](#) Neglect of duty, [\[FN12\]](#) inefficiency, [\[FN13\]](#) and the good faith abolition of a position for valid reasons [\[FN14\]](#) are all legally sufficient causes for removal.

A discharge for just cause will be upheld if it meets two criteria: (1) it is reasonable to discharge the employee because of misconduct and (2) the employee had notice, express or fairly implied, that such conduct would be grounds for discharge. [\[FN15\]](#) Whether the assigned cause is sufficient in law to justify removal of officer is a question for the court. [\[FN16\]](#)

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[\[FN1\]](#) *Golaine v. Cardinale*, 142 N.J. Super. 385, 361 A.2d 593 (Law Div. 1976), judgment aff'd, 163 N.J. Super. 453, 395 A.2d 218 (App. Div. 1978).

- As to what constitutes "just" or "legal" cause for removal under civil service laws, see [Am. Jur. 2d, Civil Service § 64](#).

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[\[FN2\]](#) *In re Grievance of Towle*, 164 Vt. 145, 665 A.2d 55 (1995).

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[\[FN3\] Moreau v. Town of Turner, 661 A.2d 677 \(Me. 1995\).](#)

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[\[FN4\] Batley v. Kendall County Sheriff's Dept. Merit Commission, Kendall County Ill., 99 Ill. App. 3d 622, 55 Ill. Dec. 28, 425 N.E.2d 1201 \(2d Dist. 1981\).](#)

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[\[FN5\] Chapman v. City of Rockland, 524 A.2d 46 \(Me. 1987\).](#)

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[\[FN6\] Battle v. Illinois Civil Service Commission, 78 Ill. App. 3d 828, 33 Ill. Dec. 597, 396 N.E.2d 1321 \(1st Dist. 1979\); Golaine v. Cardinale, 142 N.J. Super. 385, 361 A.2d 593 \(Law Div. 1976\), judgment aff'd, 163 N.J. Super. 453, 395 A.2d 218 \(App. Div. 1978\).](#)

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[\[FN7\] Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821 \(1972\); State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321 \(1935\).](#)

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[\[FN8\] Batley v. Kendall County Sheriff's Dept. Merit Commission, Kendall County Ill., 99 Ill. App. 3d 622, 55 Ill. Dec. 28, 425 N.E.2d 1201 \(2d Dist. 1981\).](#)

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[\[FN9\] LaPointe v. Board of Educ. of Town of Winchester, 274 Conn. 806, 878 A.2d 1154, 200 Ed. Law Rep. 790 \(2005\).](#)

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[\[FN10\] LaPointe v. Board of Educ. of Town of Winchester, 274 Conn. 806, 878 A.2d 1154, 200 Ed. Law Rep. 790 \(2005\).](#)

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[\[FN11\] Woods v. State Civil Service Com'n, 590 Pa. 337, 912 A.2d 803 \(2006\).](#)

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[\[FN12\] Battle v. Illinois Civil Service Commission, 78 Ill. App. 3d 828, 33 Ill. Dec. 597, 396 N.E.2d 1321 \(1st Dist. 1979\); McSweeney v. Town Manager of Lexington, 379 Mass. 794, 401 N.E.2d 113 \(1980\).](#)

- As to neglect of duty as a specific ground for removal, generally, see [§ 187](#).

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[\[FN13\] McSweeney v. Town Manager of Lexington, 379 Mass. 794, 401 N.E.2d 113 \(1980\).](#)

- As to inefficiency as a specific cause for removal, generally, see [§ 182](#).

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[\[FN14\] McSweeney v. Town Manager of Lexington, 379 Mass. 794, 401 N.E.2d 113 \(1980\).](#)

- As to abolition of public positions or offices, generally, see [§§ 44 et seq.](#)

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[\[FN15\] In re Grievance of Towle, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

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[\[FN16\] LaPointe v. Board of Educ. of Town of Winchester, 274 Conn. 806, 878 A.2d 1154, 200 Ed. Law Rep. 790 \(2005\).](#)

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**§ 182. Inefficiency, incompetency, incapacity; unsatisfactory work performance**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

Inefficiency,[[FN1](#)] incompetency,[[FN2](#)] and incapacity[[FN3](#)] may be grounds for the removal of public officers, although certain minor inefficiencies have been held not to warrant the removal of public officers from their positions.[[FN4](#)] Furthermore, the Federal Constitution does not protect from dismissal an incompetent public servant if he or she is dismissed for any reason other than demonstrable retaliation for exercise of his or her First Amendment rights.[[FN5](#)] Termination of public employment is justified by evidence of unsatisfactory work performance, including failure to work required overtime, numerous absences, and excessive tardiness.[[FN6](#)] Furthermore, the employment of a public officer has been properly terminated for the officer's sleeping on the job.[[FN7](#)]

**Observation:** Constitutions afford a public employee no right to refuse to account for his or her job performance, or to avoid dismissal as punishment for such a refusal. The constitutional right against self-incrimination simply forbids use of the compelled statements, or the fruits thereof, in a criminal prosecution against the employee.[[FN8](#)]

It has been said that discharge of a government employee for cause is inappropriate where the employee's alleged misconduct was substantially related to or caused by a psychiatric condition.[[FN9](#)]

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[[FN1](#)] [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942).

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[[FN2](#)] [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942); [State v. Santillanes](#), 99 N.M. 89, 654 P.2d 542 (1982) (gross incompetency in discharging the duties of office).

- A finding of incompetence, as grounds for removal under the Civil Service Law, only requires evidence of

some dereliction or neglect of duty. [Phillips v. Le Page](#), 4 A.D.3d 704, 772 N.Y.S.2d 422 (3d Dep't 2004).

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[FN3] [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942).

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[FN4] [Jacobowitz v. U. S.](#), 191 Ct. Cl. 444, 424 F.2d 555, 6 A.L.R. Fed. 61 (1970).

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[FN5] [Muir v. County Council of Sussex County](#), 393 F. Supp. 915 (D. Del. 1975).

- As to dismissal from public office or employment as infringing on constitutional rights, generally, see [§ 176](#).

- As to dismissal or removal of public officers or employees based on their exercise of their First Amendment right of freedom of speech, generally, see §§ [197](#) to [199](#).

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[FN6] [Sargeant v. Director, Brooklyn Developmental Center](#), 84 A.D.2d 843, 444 N.Y.S.2d 674 (2d Dep't 1981), order aff'd, [56 N.Y.2d 628](#), 450 N.Y.S.2d 482, 435 N.E.2d 1097 (1982).

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[FN7] [Nebraska Dept. of Correctional Services v. Hansen](#), 238 Neb. 233, 470 N.W.2d 170 (1991) (corrections officer).

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[FN8] [Spielbauer v. County of Santa Clara](#), 45 Cal. 4th 704, 88 Cal. Rptr. 3d 590, 199 P.3d 1125 (2009), petition for cert. filed, [77 U.S.L.W. 3635](#) (U.S. May 5, 2009).

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[FN9] [Hermesdorf v. Wu](#), 372 Ill. App. 3d 842, 310 Ill. Dec. 721, 867 N.E.2d 34 (2d Dist. 2007), appeal denied, [225 Ill. 2d 632](#), 314 Ill. Dec. 824, 875 N.E.2d 1111 (2007).

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**§ 183. Immorality; corruption in office or corrupt or oppressive performance of duty**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

Statutes have sometimes authorized removal of public officers for immoral conduct,[[FN1](#)] or for any acts which, in the opinion of the court or jury, amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office.[[FN2](#)] Furthermore, some statutes have required removal from office of certain public officers who have corruptly or oppressively performed any act which it is their duty to perform.[[FN3](#)]

Under a statute providing for the removal of public employees for immoral conduct, such standard is a standard of the general public, not some higher standard.[[FN4](#)]

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[[FN1](#)] [Risner v. State Personnel Bd. of Review, 56 Ohio App. 2d 21, 10 Ohio Op. 3d 44, 381 N.E.2d 346 \(10th Dist. Franklin County 1978\).](#)

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[[FN2](#)] [State v. Santillanes, 99 N.M. 89, 654 P.2d 542 \(1982\).](#)

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[[FN3](#)] [In re Rome, 218 Kan. 198, 542 P.2d 676 \(1975\).](#)

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[[FN4](#)] [Risner v. State Personnel Bd. of Review, 56 Ohio App. 2d 21, 10 Ohio Op. 3d 44, 381 N.E.2d 346 \(10th Dist. Franklin County 1978\).](#)

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**§ 184. Insubordination**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

Dismissal of a state employee has been deemed proper in some instances on the grounds of willful insubordination, as, for example, based on the employee's persistent failure to return to work and falsification of a sick leave application.[FN1] In this regard, where a public employer's request that an employee submit to a medical examination by a doctor of its choice was reasonable, the failure of the employee to honor such request, and after which she was absent from the workplace without authorization for more than three consecutive days, gave the public employer cause to terminate her employment.[FN2]

Yet a public official cannot be discharged for insubordination where the alleged insubordinate conduct was based on refusal to participate in an illegal activity.[FN3] Furthermore, the removal of an employee with a state bureau on the ground of, inter alia, insubordination, based on his or her failure to surrender certain bureau documents requested by the bureau's legal counsel during an internal investigation, has been deemed too harsh a penalty for the isolated action involved.[FN4]

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[FN1] [Appeal of Gielen](#), 139 N.H. 283, 652 A.2d 144 (1994).

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[FN2] [Southeast Human Service Center, Dept. of Human Services v. Eiseman](#), 525 N.W.2d 664 (N.D. 1994).

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[FN3] [Parrish v. Civil Service Commission of Alameda County](#), 66 Cal. 2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

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[FN4] [Brown v. Ohio Bur. of Emp. Serv.](#), 70 Ohio St. 3d 1, 1994-Ohio-156, 635 N.E.2d 1230 (1994).

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**§ 185. Malfeasance or misfeasance**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

In some jurisdictions, constitutional provisions subject all officers not liable to impeachment to removal for malfeasance in office,[[FN1](#)] and in other jurisdictions, malfeasance in office is a statutory ground for removal.[[FN2](#)] "Malfeasance" is the doing of an act which a person ought not to do at all.[[FN3](#)] Malfeasance in office can occur when an officer exercises official duties or acts "under color of office." [[FN4](#)] It is unnecessary to show a specific intent to defraud or that the wrongful act is criminal or corrupt in character in order to establish malfeasance in office.[[FN5](#)] One act of malfeasance alone can be grounds for removal of a public official, and willful action is not specifically required.[[FN6](#)] Where removal proceedings against a lay public officer on charges of malfeasance in office arise from his or her erroneous interpretation of a statute that has never before been interpreted, and ambiguity exists in the statute such that it is capable of being understood by reasonably well-informed persons in more than one sense, removal from office is a more drastic remedy than the offense calls for.[[FN7](#)]

"Misfeasance" is the improper doing of an act which a person might lawfully do.[[FN8](#)] The acceptance of increased compensation during an officer's term of office has been held to constitute misfeasance in office, justifying removal.[[FN9](#)]

It has been said that in order to constitute malfeasance or misfeasance, the wrongful act must be accompanied by some evil intent or motive, or with such gross negligence as to be equivalent to fraud.[[FN10](#)]

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[[FN1](#)] [Municipal Court of Seattle ex rel. Tuberg v. Beighle](#), 96 Wash. 2d 753, 638 P.2d 1225 (1982).

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[[FN2](#)] [Phillips v. Dally](#), 143 A.D.2d 273, 532 N.Y.S.2d 32 (2d Dep't 1988).

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[[FN3](#)] [In re Removal of Kuehnle](#), 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 (12th Dist. Madison County 2005).

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[[FN4](#)] [Madsen v. Brown](#), 701 P.2d 1086 (Utah 1985).

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[[FN5](#)] [Kemp v. Boyd](#), 166 W. Va. 471, 275 S.E.2d 297 (1981).

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[\[FN6\] In re Removal of Kuehnle, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 \(12th Dist. Madison County 2005\).](#)

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[\[FN7\] Kemp v. Boyd, 166 W. Va. 471, 275 S.E.2d 297 \(1981\).](#)

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[\[FN8\] In re Removal of Kuehnle, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 \(12th Dist. Madison County 2005\).](#)

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[\[FN9\] Bruno v. Civil Service Commission of City of Chicago, 38 Ill. App. 2d 100, 186 N.E.2d 108 \(1st Dist. 1962\)](#) (retention by officer of overpayment).

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[\[FN10\] Raduszewski v. Superior Court In and For New Castle County, 232 A.2d 95 \(Del. 1967\).](#)

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**§ 186. National security interests**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.7](#)

Subject to certain statutory procedural requirements,[\[FN1\]](#) the head of a federal agency may remove an employee suspended in the interests of national security when, after such investigation and review as the head

of the agency considers necessary, he or she determines that removal is necessary or advisable in the interests of national security.[FN2] The determination of the head of the agency is final.[FN3]

**Practice Tip:** Removals in the interest of national security may not be grieved in a negotiated grievance process.[FN4]

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[FN1] § 451.

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[FN2] 5 U.S.C.A. § 7532(b).

- The language of 5 U.S.C.A. § 7532 is permissive rather than mandatory, such that the statute's procedures do not pre-empt removal procedures under 5 U.S.C.A. § 7513 providing for removal, suspension for more than 14 days, reduction in grade or pay, furlough for 30 days or less of employees for such cause as will promote the efficiency of the federal civil service whenever removal could be taken under 5 U.S.C.A. § 7532. Carlucci v. Doe, 488 U.S. 93, 109 S. Ct. 407, 102 L. Ed. 2d 395 (1988).

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[FN3] 5 U.S.C.A. § 7532(b).

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[FN4] Am. Jur. 2d, Labor and Labor Relations § 458.

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**§ 187. Neglect of or refusal to perform duty; nonfeasance; negligence in office**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 25](#) (Petition or application—Taxpayer's action to remove public officer—Dereliction of duty)

Statutes in some jurisdictions have provided that certain public officers who neglect or refuse to perform any act which it is their duty to perform must be removed from office,[[FN1](#)] or that particular officers who knowingly or willfully neglect to perform any duty enjoined on such officer by any of the laws of the state are to be ousted from office.[[FN2](#)] Furthermore, statutes sometimes authorize removal for gross negligence of a public officer in discharging the duties of the office.[[FN3](#)]

Neglect of duty refers to the officer's neglect or failure to do and perform the duties of his or her office, or duties required of the office by law.[[FN4](#)] "Gross neglect of duty" allowing the removal of a public official is more than mere neglect and occurs when such neglect of duty, either from the gravity of the case or the frequency of the instances, become so serious as to endanger or threaten the public welfare.[[FN5](#)] The violation of a criminal statute proscribing assaultive conduct can be neglect of duty by a public employee if it occurs in the course of his or her duty, irrespective of lack of an instruction to the employee that he or she should obey the law.[[FN6](#)] However, the removal of an employee with a state bureau on the ground of, inter alia, neglect of duty, based on his or her failure to surrender certain bureau documents requested by the bureau's legal counsel during an internal investigation, has been deemed too harsh a penalty for the isolated action involved.[[FN7](#)]

"Nonfeasance," for purposes of a statute allowing the removal of a public official for misconduct in office, is the omission of an act which a person ought to do.[[FN8](#)]

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[[FN1](#)] [In re Rome](#), 218 Kan. 198, 542 P.2d 676 (1975).

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[[FN2](#)] [State, ex rel. Estep v. Peters](#), 815 S.W.2d 161, 69 Ed. Law Rep. 1193 (Tenn. 1991).

- As to willful neglect of duty as ground for removal of municipal officers, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 272](#).

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[[FN3](#)] [State v. Santillanes](#), 99 N.M. 89, 654 P.2d 542 (1982).

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[[FN4](#)] [State ex rel. Hardie v. Coleman](#), 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 (1934).

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[[FN5](#)] [In re Removal of Kuehnle](#), 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 (12th Dist. Madison County 2005).

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[[FN6](#)] [Kristal v. State Personnel Bd.](#), 50 Cal. App. 3d 230, 123 Cal. Rptr. 512 (2d Dist. 1975) (disapproved of on other grounds by, [Barber v. State Personnel Bd.](#), 18 Cal. 3d 395, 134 Cal. Rptr. 206, 556 P.2d 306 (1976)).

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[[FN7](#)] [Brown v. Ohio Bur. of Emp. Serv.](#), 70 Ohio St. 3d 1, 1994-Ohio-156, 635 N.E.2d 1230 (1994).

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[\[FN8\] In re Removal of Kuehnle, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, 200 Ed. Law Rep. 310 \(12th Dist. Madison County 2005\).](#)

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## **§ 188. Political beliefs, affiliation, or activities**

### **West's Key Number Digest**

West's Key Number Digest, [Constitutional Law](#) 1475(9)

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

### **A.L.R. Library**

[Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment, 70 A.L.R. Fed. 371.](#)

Federal and state statutes place restrictions on political activities of federal and state employees.[\[FN1\]](#) However, in some jurisdictions, a public employee may not be fired from employment for partisan and political reasons, such reasons for termination being prohibited by the rules of the state personnel board under state laws.[\[FN2\]](#) Furthermore, the United States Supreme Court has stated that the dismissal of a public employee for political patronage reasons violates that employee's rights under the First Amendment of the United States Constitution.[\[FN3\]](#) Numerous courts have held that the discharge of a nonpolicymaking, nonconfidential public

employee on the sole ground of his or her political beliefs or affiliations violates that employee's First Amendment rights.[FN4] However, the ultimate inquiry with respect to the validity under the First Amendment of the dismissal of a public employee because of his or her political beliefs has been said to be not whether the label "policymaker" or "confidential" fits a particular position, but whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.[FN5] Under the *Elrod* and *Branti* decisions of the United States Supreme Court, a public official cannot be fired on the basis of his or her political affiliation unless the nature of the official's job makes political loyalty a valid qualification, either because the job involves the making of policy and thus the exercise of political judgment or the provision of political advice to an elected superior, or because it is a job, such as a speechwriting, that gives the holder access to his or her political superiors' confidential, politically sensitive thoughts.[FN6] In general, employees who have merely ministerial duties with very little discretion and employees whose discretion is channeled by professional rather than political norms, are not within the *Elrod/Branti* policymaker exception to the general prohibition on the termination of government employees because of their political affiliation.[FN7]

Unless the government can demonstrate an overriding interest of vital importance requiring that a person's private political beliefs conform to those of the hiring authority, his or her beliefs cannot be the sole basis for depriving him or her of public employment.[FN8] Party affiliation may, however, be an acceptable requirement for some types of government employment, since, if an employee's private political beliefs interfere with the discharge of his or her public duties, his or her First Amendment rights may be required to yield to the state's vital interests in maintaining government effectiveness.[FN9] Unlike nonpolicymaking career positions, "political positions" are terminable without cause when political affiliation is an appropriate requirement for the position.[FN10] This rule ensures that representative government will not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.[FN11]

**Practice Tip:** To prevail on a claim of patronage dismissal, public employees need show only that they were discharged because they were not affiliated with or sponsored by a certain political party. The employer bears the burden of establishing that the employee's employment position falls within the exception to the general prohibition on patronage dismissal.[FN12]

Although the United States Supreme Court's statement of the general rule relating to political patronage dismissals of public employees was that the discharge of a public employee "solely" on the ground of political beliefs violates the First Amendment,[FN13] there is authority for the view that a violation of the First Amendment in the context of political patronage dismissals may be shown by establishing, among other things, that the employee's political affiliation was a substantial or motivating factor in the personnel decision.[FN14] Thus, in order to violate the First Amendment, political patronage need not be the sole reason for a public employee's discharge; it need only constitute a substantial or motivating factor.[FN15] A public employer can offer evidence challenging a claim that political affiliation played a substantial or motivating factor in the adverse employment action.[FN16] Additionally, even if a public employee establishes by a preponderance of the evidence that political affiliation played a substantial or motivating factor in the adverse employment action, the employer can raise an affirmative defense specific to this type of case, that is, the employer can attempt to prove by a preponderance of the evidence that the employee would have been dismissed regardless of his or her political affiliation.[FN17]

## CUMULATIVE SUPPLEMENT

### Cases:

In order to establish prima facie case of wrongful discharge based on political patronage under First Amendment, a plaintiff must show that (1) he was employed at public agency in position that does not require political affiliation, (2) he was engaged in constitutionally protected conduct, and (3) this conduct was substantial or motivating factor in government's employment decision. [U.S.C.A. Const.Amend. 1. \*Shumek v. McDowell\*, 743 F. Supp. 2d 472 \(M.D. Pa. 2010\).](#)

Former police chief's interest in not signing township supervisor's candidacy petition and in supporting his brother's candidacy outweighed township's interest in its operation as employer, for purposes of his claim that he was demoted and eventually fired in retaliation for such activities, in violation his First Amendment speech and political affiliation rights. [U.S.C.A. Const.Amend. 1. \*Moore v. Darlington Twp.\*, 690 F. Supp. 2d 378 \(W.D. Pa. 2010\).](#)

First Amendment protects nonpolicymaking public employees from adverse employment actions based on their political opinion. [U.S.C.A. Const.Amend. 1. \*Morales-Torrens v. Consorcio del Noreste\*, 767 F. Supp. 2d 287 \(D.P.R. 2010\).](#)

Under the two-part analysis to determine if a public employee was terminated for her political affiliations, a court first must examine whether the position at issue, no matter how policy-influencing or confidential it may be, relates to partisan or political interests or concerns; if so, then the court next must examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement. [U.S.C.A. Const.Amend. 1. \*Fields v. County of Beaufort in South Carolina\*, 699 F. Supp. 2d 756 \(D.S.C. 2010\).](#)

The proper test to determine if an employee was a "policymaker," for purposes of the *Elrod/Branti* test governing termination of public employees for political patronage reasons, is not whether the label "policymaker" or "confidential" fits the particular position, but rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved; political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance. [Newell v. Runnels](#), 407 Md. 578, 967 A.2d 729 (2009).

## **[END OF SUPPLEMENT]**

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[FN1] [Am. Jur. 2d, Elections §§ 460, 461.](#)

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[FN2] [Gill v. Mississippi Dept. of Wildlife Conservation](#), 574 So. 2d 586 (Miss. 1990).

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[FN3] [Elrod v. Burns](#), 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

- As to political affiliation as a requirement for eligibility or qualification for a public position, generally, see [§ 79](#).

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[FN4] [Morales-Santiago v. Hernandez-Perez](#), 488 F.3d 465 (1st Cir. 2007); [Morris v. City of Kokomo](#), 178 Ind. App. 56, 381 N.E.2d 510 (1978); [Branchick v. Com., Dept. of Labor and Industry](#), 496 Pa. 280, 436 A.2d 1182 (1981).

- Policymaking authority can be delegated from governmental positions explicitly vested with that authority to subordinates, placing the subordinates within the exception to the general rule forbidding political patronage dismissals. [Lane v. City of LaFollette, Tenn.](#), 490 F.3d 410 (6th Cir. 2007).

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[FN5] [Branti v. Finkel](#), 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

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[FN6] [Riley v. Blagojevich](#), 425 F.3d 357 (7th Cir. 2005).

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[FN7] [Riley v. Blagojevich](#), 425 F.3d 357 (7th Cir. 2005).

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[FN8] [Branti v. Finkel](#), 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

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[\[FN9\] Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 \(1980\).](#)

- In the context of political patronage cases, even if an officeholder performs fewer or less important functions than usually attend his or her position, the officeholder may still be exempt from the prohibition against political terminations if his or her position inherently encompasses tasks that render his or her political affiliation an appropriate prerequisite for effective performance. [Kiddy-Brown v. Blagojevich, 408 F.3d 346 \(7th Cir. 2005\).](#)

[\[FN10\] Ruiz-Casillas v. Camacho-Morales, 415 F.3d 127 \(1st Cir. 2005\).](#)

[\[FN11\] Ruiz-Casillas v. Camacho-Morales, 415 F.3d 127 \(1st Cir. 2005\).](#)

[\[FN12\] Kiddy-Brown v. Blagojevich, 408 F.3d 346 \(7th Cir. 2005\).](#)

[\[FN13\] Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 \(1980\); Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 \(1976\).](#)

[\[FN14\] § 469.](#)

[\[FN15\] Gann v. Cline, 519 F.3d 1090 \(10th Cir. 2008\).](#)

[\[FN16\] Peguero-Moronta v. Santiago, 464 F.3d 29 \(1st Cir. 2006\).](#)

[\[FN17\] Peguero-Moronta v. Santiago, 464 F.3d 29 \(1st Cir. 2006\).](#)

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Public Officers and Employees  
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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
F. Removal and Dismissal, in General  
2. Grounds for Removal or Dismissal  
b. Particular Grounds  
(1) In General

## § 189. Refusal to testify, waive immunity, or submit to polygraph examination

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

### A.L.R. Library

[Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers, 15 A.L.R.4th 1207](#)

The Federal Constitution is violated by discharging a public officer or employee solely because he or she asserts a self-incrimination privilege or refuses to sign a waiver of immunity.<sup>[FN1]</sup> A public employee may, however, be constitutionally discharged for refusing to answer potentially incriminating questions relating to his or her official duties if he or she has not been required to surrender his or her constitutional immunity.<sup>[FN2]</sup>

Courts have upheld the dismissal from employment of public officers or employees who have refused to take a polygraph examination in certain circumstances,<sup>[FN3]</sup> as, for example, where the officer has been promised that her answers would not be used against her in a criminal proceeding, so as to satisfy the Fifth Amendment,<sup>[FN4]</sup> where the officer has not been required to waive the privilege against self-incrimination with regard to the use of his answers or the fruits thereof, and the polygraph questions were specifically, directly, and narrowly related to performance of his official duties,<sup>[FN5]</sup> or where the use of the polygraph was neither arbitrary nor unreasonable after conventional questioning proved futile, the importance of such procedures was obvious, and where the employee appeared to have no valid justification for refusing to submit to such test.<sup>[FN6]</sup> In other circumstances, however, a discharge based on a public officer's refusal to submit to a polygraph examination has been considered improper,<sup>[FN7]</sup> where, for example, the employee was not accorded adequate procedural safeguards and it was found that the officer would have submitted to a polygraph examination had he or she known that the penalty for failing to do so was dismissal,<sup>[FN8]</sup> and where there was no civil service regulation requiring the officer to submit to such test.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 \(1977\).](#)

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<sup>[FN2]</sup> [Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 \(1977\).](#)

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<sup>[FN3]</sup> [Knebel v. City of Biloxi, 453 So. 2d 1037 \(Miss. 1984\); Hobbie v. City of Medina, 29 Ohio App. 3d 306, 505 N.E.2d 276 \(9th Dist. Medina County 1985\); Wishnow v. City of Philadelphia, 118 Pa. Commw. 289, 545 A.2d 417 \(1988\).](#)

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<sup>[FN4]</sup> [Knebel v. City of Biloxi, 453 So. 2d 1037 \(Miss. 1984\).](#)

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<sup>[FN5]</sup> [Hobbie v. City of Medina, 29 Ohio App. 3d 306, 505 N.E.2d 276 \(9th Dist. Medina County 1985\).](#)

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<sup>[FN6]</sup> [Campbell v. Personnel Bd. of Kansas City, 666 S.W.2d 806 \(Mo. Ct. App. W.D. 1984\).](#)

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[FN7] [Farmer v. City of Ft. Lauderdale](#), 427 So. 2d 187 (Fla. 1983); [Jefferson Levee Dist. v. Lanza](#), 459 So. 2d 26 (La. Ct. App. 1st Cir. 1984); [Fraternal Order of Police Lodge No. 5 v. City of Philadelphia](#), 118 Pa. Commw. 132, 546 A.2d 137 (1988), order aff'd, 523 Pa. 490, 567 A.2d 1388 (1990).

- Without a grant of immunity from future criminal prosecution, a law enforcement agency would not be allowed to lawfully administer to its employee a polygraph test within the exception of the statute excepting lie detector tests administered by law enforcement agencies in criminal investigations from prohibition on employers using lie detector tests. [Furtado v. Town of Plymouth](#), 69 Mass. App. Ct. 319, 867 N.E.2d 801 (2007), review granted, 449 Mass. 1109, 873 N.E.2d 247 (2007) and aff'd, 451 Mass. 529, 888 N.E.2d 357 (2008).

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[FN8] [Gandy v. State ex rel. Division of Investigation and Narcotics](#), 96 Nev. 281, 607 P.2d 581 (1980).

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[FN9] [Fraternal Order of Police Lodge No. 5 v. City of Philadelphia](#), 118 Pa. Commw. 132, 546 A.2d 137 (1988), order aff'd, 523 Pa. 490, 567 A.2d 1388 (1990).

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

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**§ 190. Other grounds**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.7](#)

The discharge of a public employee motivated by religious factors is not constitutionally permissible.[[FN1](#)]

Statutes have sometimes proscribed the discharge of a public employee from his or her employment because of participation in the submission of a grievance.[FN2]

In the federal civil service, the government is prohibited from taking any personnel action against an employee because the employee disclosed information that he or she reasonably believed showed a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public safety or health.[FN3] In this regard, generally, a public body may not terminate an employee for causes covered by provisions of federal[FN4] or state[FN5] "whistleblowing" acts. However, it has been said that such body may terminate an employee for any causes independent of those set out in such an act.[FN6]

A public officer may be ousted from office for violation of state antinepotism provisions.[FN7] Under some such provisions, it is not necessary, in order for one to be ousted from office on such grounds, that there be a showing of the officer's willful intent to violate the provisions.[FN8] Furthermore, whether the officer was competent to hold her public office or received no compensation for her work was irrelevant.[FN9]

In certain instances, a public officer's discharge for failure to take a drug test has been deemed proper.[FN10]

Where a removal action is based on a federal employee's refusal to accept a directed geographical reassignment, the employing agency must prove by a preponderance of the evidence that its reassignment decision was bona fide and based upon legitimate management considerations in the interest of the service.[FN11] Once a prima facie case is established by a federal agency to support the validity of its removal of an employee for cause after he or she refused to accept a reassignment, the burden of going forward with the evidence shifts to the employee, despite the fact that the burden of proof remains with the agency.[FN12] If the employee can show that the reassignment had no solid or substantial basis in personnel practice or principle, it is possible to conclude that the reassignment was not a valid exercise of managerial discretion but was instead either an improper effort to pressure the employee to retire, or was at least an arbitrary and capricious action.[FN13]

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[FN1] [Indiana State Emp. Ass'n, Inc. v. Negley](#), 365 F. Supp. 225 (S.D. Ind. 1973), judgment aff'd, 501 F.2d 1239 (7th Cir. 1974).

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[FN2] [Ekstedt v. Village of New Hope](#), 292 Minn. 152, 193 N.W.2d 821 (1972).

- For discussion of rights of employees under labor law, generally, see [Am. Jur. 2d, Labor and Labor Relations §§ 1 et seq.](#)

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[FN3] [Am. Jur. 2d, Wrongful Discharge § 119.](#)

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[FN4] [Am. Jur. 2d, Wrongful Discharge § 118.](#)

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[FN5] [Am. Jur. 2d, Wrongful Discharge § 120.](#)

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[FN6] [Johnson v. Dailey](#), 318 S.C. 318, 457 S.E.2d 613, 100 Ed. Law Rep. 780 (1995).

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[FN7] [State ex inf. Atty. Gen. v. Shull](#), 887 S.W.2d 397 (Mo. 1994) (abrogated on other grounds by, [State v. Olvera](#), 969 S.W.2d 715 (Mo. 1998)) (constitutional provisions).

- As to the appointment of relatives as public officers or employment, and antinepotism provisions or policies, generally, see §§ [94](#) to [96](#).

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[FN8] [State ex inf. Atty. Gen. v. Shull](#), 887 S.W.2d 397 (Mo. 1994) (abrogated on other grounds by, [State v. Olvera](#), 969 S.W.2d 715 (Mo. 1998)).

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[\[FN9\] State ex inf. Atty. Gen. v. Shull, 887 S.W.2d 397 \(Mo. 1994\)](#) (abrogated on other grounds by, [State v. Olvera, 969 S.W.2d 715 \(Mo. 1998\)](#)).

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[\[FN10\] Everett v. Napper, 632 F. Supp. 1481 \(N.D. Ga. 1986\)](#), judgment aff'd in part, rev'd in part on other grounds, [833 F.2d 1507 \(11th Cir. 1987\)](#) (firefighter; failure to submit to urinalysis); [Ryant v. Commissioner of Dept. of Correction of City of New York, 159 A.D.2d 224, 552 N.Y.S.2d 29 \(1st Dep't 1990\)](#) (corrections officer).

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[\[FN11\] Frey v. Department of Labor, 359 F.3d 1355 \(Fed. Cir. 2004\)](#).

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[\[FN12\] Frey v. Department of Labor, 359 F.3d 1355 \(Fed. Cir. 2004\)](#).

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[\[FN13\] Frey v. Department of Labor, 359 F.3d 1355 \(Fed. Cir. 2004\)](#).

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

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**§ 191. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.7](#)

**A.L.R. Library**

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139

Constitutional and statutory provisions have sometimes provided for the removal of public officers on conviction of particular crimes,[FN1] such as for a felony[FN2] or misdemeanor,[FN3] or a misdemeanor involving official misconduct.[FN4] Furthermore, statutes sometimes provide that an office becomes vacant upon an officer's conviction for specified crimes.[FN5]

A public officer may be removed from office where the crime in question is of the type for which one who has committed it is excluded from holding office.[FN6]

Under a statute subjecting a public officer to removal upon conviction of a felony or a misdemeanor, a public officer may not be removed upon such a conviction unless the offense occurred while the officer was serving in the office from which it was sought to remove him or her.[FN7]

Some state constitutions have been construed as not prohibiting the dismissal of a public employee because of his or her status as an ex-felon.[FN8]

**Observation:** The dismissal of criminal charges that prompted the initial disciplinary action against a public employee does not preclude a public official from administering further disciplinary action, including discharge.[FN9]

Under some statutes, removal from office after a conviction has been made mandatory,[FN10] and a conviction of certain officers by a jury for any felony or misdemeanor operates as an immediate removal from office.[FN11]

Where public officers waive their right to a jury trial and have been found guilty of official misconduct by a court on a plea of guilty or nolo contendere, the officers' plea-based convictions can result in their automatic removal from their offices despite statutory language requiring conviction by a jury.[FN12]

Various federal statutes provide for the removal or forfeiture of office or employment of federal officers or employees who commit certain criminal acts.[FN13] Thus, a federal officer who is concerned in the collection or disbursement of federal revenues and carries on any trade or business in the funds or debts of the United States, or of any state, or in any public property of either, must be removed from office.[FN14] Furthermore, federal officers, employees, or agents who are engaged in the inspection of vessels, who, upon any pretense, receive any fee or reward for their services, except what is allowed them by law, must forfeit their offices,[FN15] as must a federal officer or employee who has custody of any record, proceeding, map, book, document, paper, or other thing filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, and who willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys such item.[FN16]

**Observation:** Summary termination is not a punishment for an officeholder's crime, and reversal of the conviction on appeal does not automatically entitle the officeholder who had been removed from office to return to the vacated position.[FN17]

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[FN1] Campbell v. State, 300 Ark. 570, 781 S.W.2d 14, 10 A.L.R.5th 931 (1989) (constitutional provision).

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[FN2] Matter of Callanan, 419 Mich. 376, 355 N.W.2d 69 (1984) (statutory provision as to removal of judges); State v. Bowen, 620 P.2d 72 (Utah 1980) (statute).

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[FN3] State v. Bowen, 620 P.2d 72 (Utah 1980) (statute).

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[\[FN4\] Coffey v. State, 207 Tenn. 260, 339 S.W.2d 1, 83 A.L.R.2d 1000 \(1960\).](#)

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[\[FN5\] § 117.](#)

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[\[FN6\] Ramsey v. Powell, 244 Ga. 745, 262 S.E.2d 61 \(1979\).](#)

- As to ineligibility of one to hold office after conviction for certain crimes, see [§ 75](#).

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[\[FN7\] State v. Bowen, 620 P.2d 72 \(Utah 1980\).](#)

- As to removal for acts committed prior to one's entry into office, generally, see §§ [178](#) to [180](#).

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[\[FN8\] Dixon v. Osman, 22 Ariz. App. 430, 528 P.2d 181 \(Div. 1 1974\).](#)

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[\[FN9\] Giannini v. Firemen's Civil Service Com'n of City of Huntington, 220 W. Va. 59, 640 S.E.2d 122 \(2006\).](#)

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[\[FN10\] Gerrard v. State, 619 So. 2d 212 \(Miss. 1993\); Broyles v. State, 207 Tenn. 571, 341 S.W.2d 724 \(1960\).](#)

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[\[FN11\] Lemieux v. City of Niagara Falls, 138 A.D.2d 945, 526 N.Y.S.2d 281 \(4th Dep't 1988\)](#) (conviction of police officer); [Eckels v. Gist, 743 S.W.2d 330 \(Tex. App. Houston 1st Dist. 1987\)](#) (conviction of county officer).

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[\[FN12\] Trevino v. Barrera, 536 S.W.2d 75 \(Tex. Civ. App. San Antonio 1976\).](#)

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[\[FN13\] 18 U.S.C.A. §§ 1901, 1912, 2071\(b\).](#)

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[\[FN14\] 18 U.S.C.A. § 1901.](#)

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[\[FN15\] 18 U.S.C.A. § 1912.](#)

- As to criminal liability under this provision, see [§ 372](#).

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[\[FN16\] 18 U.S.C.A. § 2071\(b\).](#)

- As to criminal liability under this provision, see [§ 376](#).

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[\[FN17\] Duffy v. Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213 \(1993\).](#)

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**§ 192. What constitutes conviction; finality of judgment**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 64, 66, 69.7

**A.L.R. Library**

[What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139](#)

Where a statutory provision authorizes the removal of a public officer after his or her conviction of a specified crime,[FN1] the term "conviction" in such provision means a conviction in a trial court.[FN2] As a ground for removal, the term "conviction" contemplates a jury verdict or a court finding of guilt followed by a judgment upholding and implementing such verdict or finding.[FN3] However, the fact that a public officer who had been convicted of theft had not yet been sentenced has been held not to prevent or postpone his or her ouster pursuant to a statute based on his or her "conviction." [FN4]

While in a statute providing that a conviction of certain officers by a jury for any felony or misdemeanor operates as an immediate removal from office,[FN5] the word "conviction" may be construed as requiring a judgment—that is, the written declaration of the court signed by the trial judge and entered of record, showing, among other things, the conviction or acquittal of the defendant[FN6]—under a similar statute, providing that once a particular officer has been convicted of a felony or of a crime involving a violation of his or her oath of office, his or her employment is automatically terminated, an officer's position is deemed to have automatically terminated at the moment he or she is convicted by the jury's verdict.[FN7]

A plea of guilty[FN8] or nolo contendere[FN9] accepted by a court, together with a sentence or a suspended sentence, has also been considered as amounting to a conviction calling for the removal of an officer or the discharge of a public employee. It has also been held, however, that a plea of nolo contendere is limited to the particular case only, has no effect outside that case, and is not a conviction calling for removal from public office.[FN10]

The removal from office of a public officer found guilty of a crime, but before the court enters final judgment by imposing sentence, is invalid when effectuated, but becomes valid retroactively with imposition of the sentence.[FN11]



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[\[FN1\] § 191.](#)

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[\[FN2\] State ex rel. Zempel v. Twitchell, 59 Wash. 2d 419, 367 P.2d 985 \(1962\).](#)

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[\[FN3\] Helena Rubenstein Internat. v. Younger, 71 Cal. App. 3d 406, 139 Cal. Rptr. 473 \(2d Dist. 1977\); Kitsap County Republican Central Committee v. Huff, 94 Wash. 2d 802, 620 P.2d 986 \(1980\).](#)

- As to requisites of a conviction, generally, see [Am. Jur. 2d, Criminal Law §§ 736 to 738.](#)

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[\[FN4\] State ex rel. Watkins v. Fiorenzo, 71 Ohio St. 3d 259, 1994-Ohio-104, 643 N.E.2d 521 \(1994\).](#)

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[\[FN5\] As to such statutes, generally, see § 191.](#)

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[\[FN6\] Eckels v. Gist, 743 S.W.2d 330 \(Tex. App. Houston 1st Dist. 1987\).](#)

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[\[FN7\] Lemieux v. City of Niagara Falls, 138 A.D.2d 945, 526 N.Y.S.2d 281 \(4th Dep't 1988\) \(police officer\).](#)

- As to the removal from office of sheriffs or other peace officers based on their convictions of crimes, generally, see [Am. Jur. 2d, Sheriffs, Police, and Constables § 25.](#)

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[\[FN8\] Campbell v. State, 300 Ark. 570, 781 S.W.2d 14, 10 A.L.R.5th 931 \(1989\); Cardon v. Dauterive, 264 So. 2d 806 \(La. Ct. App. 4th Cir. 1972\), writ refused, 262 La. 968, 265 So. 2d 240 \(1972\).](#)

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[\[FN9\] Padilla v. State Personnel Bd., 8 Cal. App. 4th 1136, 10 Cal. Rptr. 2d 849 \(3d Dist. 1992\); Ballurio v. Castellini, 29 N.J. Super. 383, 102 A.2d 662 \(App. Div. 1954\).](#)

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[\[FN10\] State ex rel. Woods v. Thrower, 272 Ala. 344, 131 So. 2d 420 \(1961\).](#)

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[\[FN11\] Slawik v. Folsom, 410 A.2d 512 \(Del. 1979\).](#)

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**§ 193. Effect of federal conviction on state officers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

**A.L.R. Library**

[Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732](#)

In some jurisdictions, a public officer's conviction of a federal offense is a conviction that vacates the nonfederal public office held by such officer.[\[FN1\]](#) Furthermore, constitutional provisions in some jurisdictions authorize the removal of certain state public officers if he or she was convicted of a felony under federal law.[\[FN2\]](#) State courts have reached different results in determining the effect of an officer's conviction for federal income tax evasion, holding either that such conviction is,[\[FN3\]](#) or is not,[\[FN4\]](#) a sufficient ground to require his or her removal from a nonfederal office.

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[\[FN1\]](#) § 117.

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[\[FN2\]](#) [Matter of Callanan](#), 419 Mich. 376, 355 N.W.2d 69 (1984) (provision as to removal of judges); [State ex inf. Peach v. Goins](#), 575 S.W.2d 175 (Mo. 1978).

- As to disqualification of state office as affected by conviction under federal law or the law of another state, generally, see [§ 76](#).

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[\[FN3\]](#) [People ex rel. Keenan v. McGuane](#), 13 Ill. 2d 520, 150 N.E.2d 168, 71 A.L.R.2d 580 (1958).

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[\[FN4\]](#) [People v. Enlow](#), 135 Colo. 249, 310 P.2d 539 (1957); [Tucker v. Huval](#), 374 So. 2d 745 (La. Ct. App. 3d Cir. 1979).

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**§ 194. Effect of appeal**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

Although it has sometimes been held that an officer convicted of a felony could not be removed from office while an appeal from the conviction was pending,[[FN1](#)] the view has also been followed that the mere fact that a person who has been convicted may, by means of an appeal, ultimately succeed in establishing his or her innocence does not necessarily entitle him or her to hold the office in the meantime,[[FN2](#)] since the need for public trust and confidence in public officers may require removal prior to completion of the appellate process.[[FN3](#)]

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[[FN1](#)] [Cornett v. Judicial Retirement and Removal Commission, 625 S.W.2d 564 \(Ky. 1981\).](#)

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[[FN2](#)] [People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 71 A.L.R.2d 580 \(1958\); Matter of Callanan, 419 Mich. 376, 355 N.W.2d 69 \(1984\); Bucklew v. State, 192 So. 2d 275 \(Miss. 1966\).](#)

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[[FN3](#)] [Kitsap County Republican Central Committee v. Huff, 94 Wash. 2d 802, 620 P.2d 986 \(1980\).](#)

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**§ 195. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs, and this includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.[FN1] In some jurisdictions, constitutional provisions subject all officers not liable to impeachment to removal for misconduct.[FN2] Also, in some states statutory provisions authorize removal for misconduct in office.[FN3]

Misconduct in office, for purposes of removal, has been defined as any unlawful behavior by a public officer in relation to his or her office, willful in character.[FN4] It has been said to involve intentional wrongdoing or total lack of concern for one's conduct, and is more than that conduct which comes about by reason of error in judgment or lack of diligence.[FN5] Removal of a public officer is a drastic remedy reserved for unscrupulous conduct or gross dereliction of duty or conduct that connotes a pattern of misconduct and abuse of authority,[FN6] and for malicious and corrupt acts as compared to minor neglect of duties, administrative oversights, and violations of law.[FN7]

An officer violating the prohibition against personal interest in contracts may be guilty of misconduct.[FN8] Also, criminal misconduct in office or misconduct that proceeds from a corrupt or other improper motive not only justifies, but also compels removal.[FN9] Acts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories.[FN10]

Statutory provisions have sometimes allowed removal of public officers for, inter alia, any misconduct, maladministration, or malversation in office.[FN11] Under such a provision, some courts have declined to remove an officer, where the charges are based not on malicious or corrupt acts, but on minor neglect of duties, administrative oversights, or violations of law.[FN12]

Statutes in some jurisdictions provide that certain public officers who in any public place are in a state of intoxication produced by strong drink voluntarily taken, or who engage in any form of gambling, or who commit any act constituting a violation of any penal statute involving moral turpitude must forfeit their offices[FN13] and are to be ousted from office in the manner specified by statute.[FN14]

**Practice Tip:** Where a state board chooses to treat an employee's misconduct as a continuing offense for which he or she may take corrective action, but the applicable personnel rules allow the board to dismiss an employee charged with certain misconduct without a warning, that the board allows the employee time to take remedial action does not render improper his or her later dismissal for continued dereliction.[\[FN15\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Police department regulations were not "laws" within the meaning of official misconduct statute, providing that public officer or employee commits misconduct when he intentionally or recklessly fails to perform any mandatory duty as required by law, since there was no indication that the police regulations were enacted, sanctioned, or approved by a governing body, and thus, violation by defendant, a police detective, of those regulations alone could not sustain a conviction under the official misconduct statute. S.H.A. [720 ILCS 5/33-3\(a\)](#). [People v. Dorrough, 348 Ill. Dec. 401, 944 N.E.2d 354 \(App. Ct. 1st Dist. 2011\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 \(1983\).](#)

- A federal agency may take adverse action against an employee for false statements the employee made during an agency investigation of an underlying charge of employee misconduct, despite the fact that the employee was not under oath at the time of the false statements. [LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 \(1998\)](#).

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[\[FN2\] Municipal Court of Seattle ex rel. Tuberg v. Beighle, 96 Wash. 2d 753, 638 P.2d 1225 \(1982\).](#)

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[\[FN3\] Phillips v. Dally, 143 A.D.2d 273, 532 N.Y.S.2d 32 \(2d Dep't 1988\).](#)

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[\[FN4\] In re Emmet, 293 Ala. 143, 300 So. 2d 435 \(1974\).](#)

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[\[FN5\] In re Emmet, 293 Ala. 143, 300 So. 2d 435 \(1974\).](#)

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[\[FN6\] Price v. Evers, 45 A.D.3d 1075, 845 N.Y.S.2d 553 \(3d Dep't 2007\).](#)

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[\[FN7\] Hart v. Trumansburg Bd. of Trustees, 41 A.D.3d 1025, 838 N.Y.S.2d 246 \(3d Dep't 2007\).](#)

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[\[FN8\] Eagleton v. Murphy, 348 Mo. 949, 156 S.W.2d 683, 138 A.L.R. 749 \(1941\).](#)

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[\[FN9\] Golaine v. Cardinale, 142 N.J. Super. 385, 361 A.2d 593 \(Law Div. 1976\), judgment aff'd, 163 N.J. Super. 453, 395 A.2d 218 \(App. Div. 1978\).](#)

- As to criminal conduct or conviction for crime as grounds for dismissal or removal of public officers and employees, generally, see §§ [191](#) to [194](#).

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[\[FN10\] Chaplin v. New York City Dept. of Educ., 48 A.D.3d 226, 850 N.Y.S.2d 425, 229 Ed. Law Rep. 202 \(1st Dep't 2008\).](#)

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[\[FN11\] Phillips v. Dally, 143 A.D.2d 273, 532 N.Y.S.2d 32 \(2d Dep't 1988\).](#)

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[\[FN12\] Deats v. Carpenter, 61 A.D.2d 320, 403 N.Y.S.2d 128 \(3d Dep't 1978\).](#)

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[\[FN13\] § 164.](#)

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[\[FN14\] State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[\[FN15\] Appeal of Gielen, 139 N.H. 283, 652 A.2d 144 \(1994\).](#)

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**§ 196. Knowing, willful, or gross misconduct or maladministration**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#), [69.7](#)

Statutory provisions sometimes authorize the removal of public officers for willful misconduct or maladministration.[\[FN1\]](#) Under such a provision, it is necessary to show a breach of duty committed knowingly and with a purpose to do wrong in order to establish willful misconduct.[\[FN2\]](#) Statutes in some jurisdictions provide that specified public officers who knowingly or willingly misconduct themselves in office must forfeit their office,[\[FN3\]](#) and will be ousted in the manner specified by statute.[\[FN4\]](#) Even though the "good faith" of

an officer can be a factor to be considered in determining whether the officer's actions constitute "misconduct" for purposes of such a statute,[FN5] and misconduct in office, for purposes of removal, has been defined as any unlawful behavior by a public officer in relation to his or her office, willful in character,[FN6] an intent or desire to benefit personally from an activity is not an essential element for such purposes.[FN7]

A public officer's presentation of a false and excessive claim for reimbursement of expenses, knowingly padded, constitutes willful misconduct in office.[FN8] Minor and unintentional errors in claims of public officials do not, however, indicate an intent to defraud or constitute willful misconduct in office.[FN9]

In addition to dismissals for willful or knowing misconduct, public employees have also sometimes been discharged for gross misconduct.[FN10] In order for misconduct to be "gross," the conduct must be something significantly more than ordinary misconduct.[FN11]

**Observation:** While, in some jurisdictions, the state, in most misconduct cases, is required to follow a course of progressive discipline prior to dismissal,[FN12] state employees' collective-bargaining agreements have sometimes provided that in cases of gross misconduct, the state may bypass progressive discipline. Under such agreement, a state employee's performance of sexual acts with a co-worker during his shift and in a state office building or state vehicle was gross misconduct and, therefore, the state had just cause for terminating his employment.[FN13]

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[FN1] [State v. Callaway, 268 N.W.2d 841 \(Iowa 1978\).](#)

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[FN2] [State v. Callaway, 268 N.W.2d 841 \(Iowa 1978\).](#)

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[FN3] [§ 164.](#)

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[FN4] [State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[FN5] [State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[FN6] [§ 195.](#)

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[FN7] [State, ex rel. Estep v. Peters, 815 S.W.2d 161, 69 Ed. Law Rep. 1193 \(Tenn. 1991\).](#)

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[FN8] [State ex rel. Tomasic v. Cahill, 222 Kan. 570, 567 P.2d 1329 \(1977\).](#)

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[FN9] [State ex rel. Tomasic v. Cahill, 222 Kan. 570, 567 P.2d 1329 \(1977\).](#)

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[FN10] [Pechacek v. Minnesota State Lottery, 497 N.W.2d 243 \(Minn. 1993\).](#)

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[FN11] [Jones v. Kansas State University, 279 Kan. 128, 106 P.3d 10, 195 Ed. Law Rep. 645 \(2005\).](#)

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[FN12] [§ 195.](#)

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[FN13] [In re Grievance of Towle, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

- As to collective bargaining, generally, see [Am. Jur. 2d, Labor and Labor Relations §§ 2208 et seq.](#)

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## § 197. Generally

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 1183, 1947

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[First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9](#)

[First Amendment protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 107 A.L.R. Fed. 21](#)

[First Amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 A.L.R. Fed. 396](#)

### Trial Strategy

[Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech, 22 Am. Jur. Proof of Facts 3d 203](#)



When citizens enter government service, by necessity they must accept certain limitations on their freedoms, but at the same time, the First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens, and consequently, when government employees speak on matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.<sup>[FN1]</sup> Thus, a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interests in freedom of speech.<sup>[FN2]</sup> A state cannot dismiss a public employee for exercising his or her right to speak out on issues of public concern, as to allow a governmental unit to discharge a person because of his or her constitutionally protected speech would have an inhibiting effect on the exercise of that freedom.<sup>[FN3]</sup> However, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>[FN4]</sup>

The threshold question is whether the employee's speech may be fairly characterized as constituting speech as a matter of public concern.<sup>[FN5]</sup> The court must decide whether the employee is speaking out as a citizen, upon matters of public concern, or as an employee, upon matters of personal interest.<sup>[FN6]</sup> Public employees speaking pursuant to their official duties are speaking as employees, not citizens, and thus are not protected by the First Amendment from retaliation regardless of the content of their speech.<sup>[FN7]</sup> If the communication involved cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reason for the employee's discharge.<sup>[FN8]</sup>

Although a discharge for exercise of First Amendment rights is impermissible, the exercise of a First Amendment right does not insulate a public employee from being discharged for occurrences prior to the exercise of the right.<sup>[FN9]</sup> Furthermore, the exercise of the constitutional right does not provide a grace period for a public employee immunizing him or her from a discharge immediately following such exercise, as long as the exercise of the right did not motivate the dismissal.<sup>[FN10]</sup>

It has been said that a government employee's right to gripe about the conditions of his or her job is protected to the same degree as that of private employees, as only under such condition is efficient government service possible.<sup>[FN11]</sup>

Where a lawful reason for a public employee's dismissal exists apart from his or her exercise of the First Amendment right to free speech, the dismissal of such employee will be upheld.<sup>[FN12]</sup>

**Practice Tip:** Whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review.<sup>[FN13]</sup> Also, in this regard, a federal appellate court may determine de novo whether a Federal District Court correctly weighed the competing interests of a public employee and his or her government employer.<sup>[FN14]</sup>

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<sup>[FN1]</sup> [Brammer-Hoelter v. Twin Peaks Charter Academy](#), 492 F.3d 1192, 222 Ed. Law Rep. 596 (10th Cir. 2007).

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<sup>[FN2]</sup> [Rankin v. McPherson](#), 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).

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<sup>[FN3]</sup> [Larson v. Ruskowitz](#), 252 Kan. 963, 850 P.2d 253 (1993); [Riddle v. City of Ottawa](#), 12 Kan. App. 2d 714, 754 P.2d 465 (1988).

- As to remedies of a public employee for dismissal based on the exercise of First Amendment rights, see [§ 480](#).

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[\[FN4\] Nair v. Oakland County Community Mental Health Authority, 443 F.3d 469, 2006 FED App. 0118P \(6th Cir. 2006\).](#)

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[\[FN5\] Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 \(1987\).](#)

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[\[FN6\] Finn v. New Mexico, 249 F.3d 1241 \(10th Cir. 2001\).](#)

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[\[FN7\] Spiegla v. Hull, 481 F.3d 961 \(7th Cir. 2007\), cert. denied, 128 S. Ct. 441, 169 L. Ed. 2d 308 \(2007\).](#)

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[\[FN8\] O'Connor v. Steeves, 994 F.2d 905 \(1st Cir. 1993\); Larson v. Ruskowitz, 252 Kan. 963, 850 P.2d 253 \(1993\); Riddle v. City of Ottawa, 12 Kan. App. 2d 714, 754 P.2d 465 \(1988\).](#)

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[\[FN9\] Butler v. Hamilton, 542 F.2d 835 \(10th Cir. 1976\).](#)

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[\[FN10\] Butler v. Hamilton, 542 F.2d 835 \(10th Cir. 1976\).](#)

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[\[FN11\] Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75, 50 Ed. Law Rep. 365 \(4th Cir. 1988\); Thomasson v. Modlinski, 876 F. Supp. 818 \(E.D. Va. 1995\), judgment aff'd, 76 F.3d 375 \(4th Cir. 1996\).](#)

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[\[FN12\] Domiano v. Village of River Grove, 904 F.2d 1142 \(7th Cir. 1990\).](#)

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[\[FN13\] Crandon v. State, 257 Kan. 727, 897 P.2d 92 \(1995\).](#)

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[\[FN14\] Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925 \(11th Cir. 1993\).](#)

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**§ 198. Balancing state's and employee's interests**

**West's Key Number Digest**

West's Key Number Digest, [Constitutional Law](#) 1183, 1947

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

If a court finds that a terminated public employee has made statements that are within the scope of First Amendment protection,[[FN1](#)] the court must then balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[[FN2](#)] The balancing test requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.[[FN3](#)]

**Practice Tip:** The two steps in the inquiry—whether the employee's speech can be fairly characterized as constituting speech on a matter of public concern, and the balancing of the employee's right to free speech against the interests of the state—are matters of law for the court to resolve.[[FN4](#)]

It has been said that several factors must be considered in balancing the state's interest in efficient provision of public services against an employee's speech interest, including: (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his or her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.[[FN5](#)] Insofar as self-interest is found to have motivated public employee speech, the employee's expression is entitled to less weight in the balance than speech on matters of public concern intended to serve the public interest.[[FN6](#)] If the public employee prevails on the balancing test, the court must determine whether the employee's speech played a "substantial part" in the government's decision to discharge him or her; if speech is determined to be protected under the two-part test, then a plaintiff must show that the speech played a substantial role in his or her discharge, or, to put it in other words, that it was a motivating factor in the discharge decision.[[FN7](#)] Even if a public employee shows that activity protected by the First Amendment was a "substantial factor" in his or her termination, the employer may show that some other factor unrelated to the protected activity was the but-for cause of the termination.[[FN8](#)]

**Observation:** Ordinarily, the issue of whether protected speech played a substantial role in a public employee's termination is an issue of fact to be resolved by the jury. However, the discharged employee does not in every case successfully resist a summary judgment motion merely by asserting that certain protected speech caused termination from public employment. At some point, the speech becomes so remote in time to the discharge that a court may rule as a matter of law that even if such speech enjoys First Amendment protection, it played no role in the employee's termination.[[FN9](#)]

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[[FN1](#)] [Curran v. Cousins](#), 509 F.3d 36 (1st Cir. 2007).

[\[FN2\] Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 \(1987\).](#)

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[\[FN3\] Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 \(1983\); Barnard v. Jackson County, Mo., 43 F.3d 1218 \(8th Cir. 1995\).](#)

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[\[FN4\] Barnard v. Jackson County, Mo., 43 F.3d 1218 \(8th Cir. 1995\).](#)

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[\[FN5\] Greer v. Amesqua, 212 F.3d 358 \(7th Cir. 2000\).](#)

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[\[FN6\] Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 \(1987\).](#)

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[\[FN7\] Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925 \(11th Cir. 1993\).](#)

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[\[FN8\] Hill v. City of Scranton, 411 F.3d 118 \(3d Cir. 2005\).](#)

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[\[FN9\] Barnard v. Jackson County, Mo., 43 F.3d 1218 \(8th Cir. 1995\).](#)

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**§ 199. What constitutes protected speech addressing "matter of public concern"**

**West's Key Number Digest**

For purposes of determining whether a public officer or employee has been improperly discharged based on the officer's or employee's speech protected by the First Amendment,[FN1] whether an employee's speech addresses "a matter of public concern" must be determined by the content, form, and context of a given statement, as revealed by the whole record.[FN2] Content remains the most important factor in determining whether a public employee's speech addresses a matter of public concern.[FN3]

**Practice Tip:** Whether a public employee's statement rises to the level of public concern, for purposes of free speech protection, is a question of law.[FN4]

A public employee's speech implicates a matter of public concern and is protected by the First Amendment, if the content, form, and context establish that the speech involves a matter of political, social, or other concern to the community.[FN5] In determining whether a public employee's speech touches a matter of public concern, a court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or had a broader public purpose.[FN6] Speech that relates to police protection and public safety is generally considered to be addressing public concerns.[FN7] In this regard, speech disclosing governmental wrongdoing or misconduct,[FN8] or seeking to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials,[FN9] generally involves a matter of public concern.

The form and context of the speech may help to characterize it as relating to a matter of social or political concern to the community if, for example, the forum where the speech activity takes place is not confined merely to the public office where the speaker is employed.[FN10] However, to presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.[FN11] One's motive in writing a letter is not a determinative factor in determining whether the letter addresses a matter of public concern.[FN12]

Not all matters of public concern are ripe for comment by public employees in all circumstances.[FN13]

## CUMULATIVE SUPPLEMENT

### Cases:

For purposes of a retaliation claim under the First Amendment, because almost anything that occurs within a public agency could be of concern to the public, when determining whether speech addressed a matter of public concern, the court does not focus on the inherent interest or importance of the matters discussed by the employee; rather than looking at whether the public might or would have an interest in the matter, the court examines whether the speaker's motivation was to speak primarily as a citizen or as an employee. [U.S.C.A. Const.Amend. 1. Harris ex rel. Harris v. Pontotoc County School Dist., 635 F.3d 685 \(5th Cir. 2011\).](#)

County juvenile court detention officer's inquiry as to how to make complaint about co-worker's use of alcohol did not involve matter of public concern, and thus was not protected by First Amendment right to free speech, where employee did not provide details about alleged incident, and statement was not that co-worker was drinking on job, but rather that his breath, clothing, sweat, or skin smelled of alcohol. [U.S.C.A. Const.Amend. 1. Asbury v. Teodosio, 412 Fed. Appx. 786 \(6th Cir. 2011\).](#)

County juvenile court detention officer's protest over detention center admission procedures did not involve matter of public concern, and thus was not protected by First Amendment right to free speech, where officer complained at least in part to explain her confrontation with supervisor for which she subsequently received discipline. [U.S.C.A. Const.Amend. 1. Asbury v. Teodosio, 412 Fed. Appx. 786 \(6th Cir. 2011\).](#)

First Amendment protects the speech of public employees only when it involves matters of public concern. [U.S.C.A. Const.Amend. 1. Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist., 624 F.3d 332 \(6th Cir. 2010\).](#)

When speech by a public employee takes the form of an internal employee grievance, and is not presented to the public, the form of the speech cuts against a finding that the speech was on a matter of public concern, as required to support a claim alleging violation of the First Amendment as a result of government retaliation for the employee's speech. [U.S.C.A. Const.Amend. 1. \*Clairmont v. Sound Mental Health\*, 632 F.3d 1091 \(9th Cir. 2011\).](#)

County employee's complaints to her supervisor about funding allocation were on a matter of public concern, for purposes of her First Amendment retaliation claim; employee complained that her department, Child Welfare Services (CWS), was underfunded in part because federal funds that should have gone to CWS were allocated to other programs. [U.S.C.A. Const.Amend. 1. \*Webb v. County of Trinity\*, 734 F. Supp. 2d 1018 \(E.D. Cal. 2010\).](#)

City transit authority employee's report of alleged negligence in connection with coworker's death was the product of his official duties as a train service supervisor, and thus, did not qualify as protected speech, as required to establish First Amendment retaliation claim; transit authority regulations required supervisors to report accidents and suspected negligence. [U.S.C.A. Const.Amend. 1. \*Pabon v. New York City Transit Authority\*, 703 F. Supp. 2d 188 \(E.D. N.Y. 2010\).](#)

When determining whether a public employee's statements were on a matter of public concern and thus protected under the First Amendment as required to support a retaliation claim, the fact that employee expressed her views internally to supervisors, rather than publicly, is not dispositive; rather, the controlling issue is whether employee was expected, pursuant to her job duties, to report such problems to her supervisors. [U.S.C.A. Const.Amend. 1. \*Cicchiello v. Beard\*, 726 F. Supp. 2d 522 \(M.D. Pa. 2010\).](#)

Government employee's speech is only protected under First Amendment if it involves matters of public concern. [U.S.C.A. Const.Amend. 1. \*Del Valle Group v. Puerto Rico Ports Authority\*, 756 F. Supp. 2d 169 \(D.P.R. 2010\).](#)

If public employee's speech involved matters of personal interest instead of matters of public concern, absent most unusual circumstances, a federal court is not appropriate forum in which to review wisdom of personnel decision taken by public agency allegedly in reaction to employee's behavior. [U.S.C.A. Const.Amend. 1. \*Mulero Abreu v. Ocquendo-Rivera\*, 729 F. Supp. 2d 498 \(D.P.R. 2010\).](#)

In determining whether public employee's speech implicates public concerns, for purposes of First Amendment claim, district court analyzes content, form, and context of speech, as revealed by whole record. [U.S.C.A. Const.Amend. 1. \*Mulero Abreu v. Ocquendo-Rivera\*, 729 F. Supp. 2d 498 \(D.P.R. 2010\).](#)

**[END OF SUPPLEMENT]**

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[\[FN1\] § 197.](#)

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[\[FN2\] \*Rankin v. McPherson\*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 \(1987\).](#)

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[\[FN3\] \*Chaklos v. Stevens\*, 560 F.3d 705 \(7th Cir. 2009\).](#)

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[\[FN4\] \*Chaklos v. Stevens\*, 560 F.3d 705 \(7th Cir. 2009\).](#)

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[\[FN5\] \*Miller v. Clinton County\*, 544 F.3d 542 \(3d Cir. 2008\).](#)

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[\[FN6\] \*DeVittorio v. Hall\*, 589 F. Supp. 2d 247 \(S.D. N.Y. 2008\).](#)

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[\[FN7\] \*Redd v. Dougherty\*, 578 F. Supp. 2d 1042 \(N.D. Ill. 2008\).](#)

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[\[FN8\] Davis v. Ector County, Tex., 40 F.3d 777 \(5th Cir. 1994\).](#)

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[\[FN9\] Holder v. City of Allentown, 987 F.2d 188 \(3d Cir. 1993\); Barnard v. Jackson County, Mo., 43 F.3d 1218 \(8th Cir. 1995\).](#)

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[\[FN10\] Holder v. City of Allentown, 987 F.2d 188 \(3d Cir. 1993\).](#)

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[\[FN11\] Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 \(1983\).](#)

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[\[FN12\] Davis v. Ector County, Tex., 40 F.3d 777 \(5th Cir. 1994\).](#)

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[\[FN13\] Davis v. Ector County, Tex., 40 F.3d 777 \(5th Cir. 1994\).](#)

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

### A.L.R. Library

A.L.R. Index, Public Officers and Employees

West's A.L.R. Digest, Officers and Public Employees §§[70.7](#)

## **Forms**

[Am. Jur. Legal Forms 2d §§ 213:56 to 213:59](#)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 27, 29, 30, 33](#)

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### **§ 200. Generally**

#### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

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[Constitutionality of State and Local Recall Provisions, 13 A.L.R.6th 661](#)

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Amar, Essay, [Adventures in Direct Democracy: The Top 10 Constitutional Lessons from the California Recall Experience](#), 92 Cal. L. Rev. 927 (2004)

Garrett, [Democracy in the Wake of the California Recall](#), 153 U. Pa. L. Rev. 239 (2004)

Mistovich, Note, [To Recall or Not to Recall?](#), 14 B.U. Pub. Int. L.J. 163 (2004)

Osborne-Klein, Comment, [Electoral Recall in Washington State and California: California Needs Stricter Standards to Protect Elected Officials from Harassment](#), 28 Seattle U. L. Rev. 145 (2004)

"Recall" is the electoral process by which an elected official may be removed from office before the expiration of his or her term.[FN1] Recall is a procedure by which it is the voters themselves who make the ultimate determination as to whether an official should retain his or her office for the duration of the term to which he or she was elected.[FN2] The recall of public officers has been said to be an effective speedy remedy to remove an official who is not giving satisfaction to the public and whom the electors do not want to remain in office, regardless of whether the officer is discharging his or her full duty to the best of his or her ability and as his or her conscience dictates.[FN3] The recall process has been characterized as a special, extraordinary, and unusual proceeding.[FN4] The recall remedy is statutorily designed for prompt action following circulation of a recall petition.[FN5]

**Observation:** The person making recall charges against an elected official is not required to have firsthand knowledge of the facts, but must demonstrate to the court that he or she knows of identifiable facts that support the charges.[FN6] Generally, however, media articles do not form a sufficient basis for the personal knowledge required by law, although if documents are published by the media which directly evidence the misfeasance or malfeasance, this may suffice to establish petitioner's personal knowledge.[FN7]

In the absence of statutory authority, a recall committee does not have the capacity to sue or be sued, and thus a recall committee cannot be sued for damages.[FN8]

## CUMULATIVE SUPPLEMENT

### Cases:

A special election called as a result of a qualifying recall petition is open to all registered voters on equal terms. West's [NRSA Const. Art. 2, § 9](#). [Strickland v. Waymire](#), 126 Nev. 25, 235 P.3d 605 (2010).

### [END OF SUPPLEMENT]

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[FN1] [In re Recall of Davis](#), 164 Wash. 2d 361, 193 P.3d 98 (2008).

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[FN2] [Collins v. Morris](#), 263 Ga. 734, 438 S.E.2d 896 (1994).

- As to procedures for removal of public officers by the legislature or other public officials, see [§§ 168 et seq.](#)

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[FN3] [Groditsky v. Pinckney](#), 661 P.2d 279 (Colo. 1983); [In re Bower](#), 41 Ill. 2d 277, 242 N.E.2d 252 (1968).

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[FN4] [State ex rel. Palmer v. Hart](#), 201 Mont. 526, 655 P.2d 965 (1982).

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[FN5] [Young v. Sanders](#), 870 So. 2d 1126 (La. Ct. App. 2d Cir. 2004), writ denied, 877 So. 2d 146 (La. 2004).

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[\[FN6\] In re Recall Charges Against Seattle School Dist. No. 1 Directors, 162 Wash. 2d 501, 173 P.3d 265, 228 Ed. Law Rep. 482 \(2007\).](#)

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[\[FN7\] In re Recall of Davis, 164 Wash. 2d 361, 193 P.3d 98 \(2008\).](#)

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[\[FN8\] Collins v. Hoeme, 40 Kan. App. 2d 93, 189 P.3d 566 \(2008\),](#) review denied, (Jan. 22, 2009).

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
G. Recall  
1. In General

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**§ 201. Basis of recall authority; purpose of provisions; general nature of power granted**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

**A.L.R. Library**

[Constitutionality of State and Local Recall Provisions, 13 A.L.R.6th 661](#)

In some jurisdictions, the electorate's right to recall a public officer derives from the state constitution.[\[FN1\]](#)  
Where a state constitutional provision provides for the recall of public officers, recall is viewed as a fundamental right, which the people have reserved to themselves.[\[FN2\]](#)

In a state where there is no constitutional right to recall elective officials, the legislature may impose rational restraints on the recall of elective officials.[\[FN3\]](#) Statutes have sometimes provided that all elected public

officials in the state, except judicial officers, are subject to recall by the voters of the state or political subdivision from which elected.[FN4]

The power granted electors to remove public officers is political in nature, and not the exercise of a judicial function.[FN5]

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[FN1] Shroyer v. Sokol, 191 Colo. 32, 550 P.2d 309 (1976); Collins v. Morris, 263 Ga. 734, 438 S.E.2d 896 (1994); Noel v. Oakland County Clerk, 92 Mich. App. 181, 284 N.W.2d 761 (1979); Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (1994).

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[FN2] Shroyer v. Sokol, 191 Colo. 32, 550 P.2d 309 (1976); Noel v. Oakland County Clerk, 92 Mich. App. 181, 284 N.W.2d 761 (1979).

- Under state constitutional provisions, the electorate's recall authority constitutes a substantial right. Collins v. Morris, 263 Ga. 734, 438 S.E.2d 896 (1994).

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[FN3] Eisenberg v. Committee to Recall Levin, 175 N.J. Super. 115, 417 A.2d 1067 (Law Div. 1980).

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[FN4] von Stauffenberg v. Committee for Honest and Ethical School Bd., 903 P.2d 1055, 104 Ed. Law Rep. 481 (Alaska 1995).

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[FN5] State ex rel. Lottman v. Board of Ed. of School Dist. No. 103, 201 Neb. 486, 268 N.W.2d 435 (1978).

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**§ 202. Validity of provisions**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 70.7

The recall of public officers is not socialistic, communistic, or otherwise obnoxious to a republican form of government, and the recall of a public officer does not amount to a denial of due process of law or constitute a bill of attainder.[FN1] Furthermore, claims that recall would be cruel and inhuman punishment of the recalled officer and that an officer's right to hold office for a full term is a vested property right have been rejected as frivolous.[FN2] Also, state recall statutes have been found to afford public officials adequate due process protection.[FN3] In addition, a statute which states as a ground for recall that an official "has committed an act or acts of malfeasance while in office," is not unconstitutionally overbroad, where the court has previously discussed at length the definition of the term "malfeasance in office" and the legislature enacted the statute in question with the knowledge of that definition, so that it could not be said that the term "malfeasance" failed to provide notice to elected officials of what conduct was forbidden.[FN4]

On the other hand, an attempt, through a city charter provision, to restrict the recall petition powers of the people to registered voters is constitutionally impermissible.[FN5] Furthermore, a statute requiring a greater percentage of persons to sign a recall petition than is specified by the state constitution is invalid.[FN6]

**Practice Tip:** The person attacking the constitutionality of a recall statute must prove it unconstitutional beyond a reasonable doubt.[FN7]

## CUMULATIVE SUPPLEMENT

### Cases:

Michigan statute requiring recall-petition circulators to be both residents of, and registered to vote in, the district of the official to be recalled violated First Amendment free speech rights of recall-petition circulators, as applied to sponsor of effort to place a recall vote against state representative on general election ballot, where registration and residency restrictions operated to substantially decrease pool of potential circulators, and were not narrowly tailored to Michigan's compelling interest in integrity of recall petitions and combat of election fraud. [U.S.C.A. Const.Amend. 1](#); [M.C.L.A. § 168.957](#). [Bogaert v. Land, 675 F. Supp. 2d 742 \(W.D. Mich. 2009\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Roberts v. Brown, 43 Tenn. App. 567, 310 S.W.2d 197 \(1957\)](#).

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[FN2] [Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 \(App. Div. 1968\)](#).

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[FN3] [Collins v. Morris, 263 Ga. 734, 438 S.E.2d 896 \(1994\)](#).

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[FN4] [Davis v. Shavers, 263 Ga. 785, 439 S.E.2d 650 \(1994\)](#).

- As to grounds for recall, generally, see [§ 204](#).

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[FN5] [Valdez v. Election Commission of City and County of Denver, 184 Colo. 384, 521 P.2d 165 \(1974\)](#).

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[\[FN6\] Shroyer v. Sokol, 191 Colo. 32, 550 P.2d 309 \(1976\).](#)

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[\[FN7\] Groditsky v. Pinckney, 661 P.2d 279 \(Colo. 1983\).](#)

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## **§ 203. Construction of provisions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

### **A.L.R. Library**

[Constitutionality of State and Local Recall Provisions, 13 A.L.R.6th 661](#)

Recall statutes should be liberally construed with a view toward promoting the purpose for which they are enacted.[\[FN1\]](#) Statutes governing the recall of elected officials are to be construed in favor of the voter, not the elected official.[\[FN2\]](#) To liberally construe statutes governing the exercise of the power to recall is not, however, to ignore entirely the requirements of those statutes.[\[FN3\]](#)

A state constitutional article providing that the people have the right to alter or reform the government, whenever required by the public good, does not guarantee the right of recall of elected officials to all citizens of the state.[\[FN4\]](#)

**Observation:** Under a constitutional provision that the name of the person against whom a recall petition is filed may not appear on the ballot as a candidate for the office, the officers who are the subject of a recall election cannot be candidates to succeed themselves if they are recalled.[[FN5](#)]

In one state it is said that because the recall election is a harsh remedy, the provisions which govern the recall process must be strictly construed.[[FN6](#)]

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[[FN1](#)] [Cleland v. Eighth Judicial Dist. Court, In and For Clark County, Dept. No. V, 92 Nev. 454, 552 P.2d 488 \(1976\).](#)

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[[FN2](#)] [In re Recall Petition of Olsen, 154 Wash. 2d 606, 116 P.3d 378 \(2005\).](#)

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[[FN3](#)] [Hazelwood v. Saul, 619 P.2d 499 \(Colo. 1980\).](#)

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[[FN4](#)] [Eisenberg v. Committee to Recall Levin, 175 N.J. Super. 115, 417 A.2d 1067 \(Law Div. 1980\).](#)

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[[FN5](#)] [Bernzen v. City of Boulder, 186 Colo. 81, 525 P.2d 416 \(1974\).](#)

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[[FN6](#)] [Young v. Sanders, 870 So. 2d 1126 \(La. Ct. App. 2d Cir. 2004\), writ denied, 877 So. 2d 146 \(La. 2004\).](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
G. Recall  
1. In General

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§ 204. Grounds

West's Key Number Digest

In some jurisdictions, the electorate has an absolute right to recall public officers for any reason or no reason.<sup>[FN1]</sup> In other jurisdictions, however, the removal petition must contain good and sufficient reason for removal.<sup>[FN2]</sup> Elected officials generally may not be recalled for decisions which are lawfully within their discretion,<sup>[FN3]</sup> and if a discretionary act is involved, the petitioner must show that the official exercised discretion in a manifestly unreasonable manner.<sup>[FN4]</sup> Statutes in some states authorize the recall of an official who has committed an act or acts of malfeasance while in office,<sup>[FN5]</sup> which ground has been held not to be unconstitutionally overbroad,<sup>[FN6]</sup> and in some jurisdictions a recall proceeding must be predicated upon a charge of misfeasance or malfeasance in office, or a violation of an oath of office.<sup>[FN7]</sup>

**Definitions:** Misfeasance and malfeasance for the purpose of a recall statute both mean any wrongful conduct that affects, interrupts, or interferes with the performance of official duty.<sup>[FN8]</sup> "Violation of the oath of office," for purposes of a recall statute, means the willful neglect or failure by an elective public officer to perform faithfully a duty imposed by law.<sup>[FN9]</sup>

Under constitutional and statutory provisions recognizing in the people a broad right to recall elected officials based on acts of malfeasance or misfeasance while in office, or a violation of the oath of office, officials may be recalled for misconduct during a prior term of office.<sup>[FN10]</sup>

A legally cognizable justification for an official's conduct renders a recall charge insufficient, even, under some circumstances, when the official actually violated the law.<sup>[FN11]</sup>

**Practice Tip:** Malfeasance should never be inferred or elected officials removed from the office in which the public has elected them without strong proof of willful and knowing wrongdoing.<sup>[FN12]</sup>

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<sup>[FN1]</sup> [Ponds v. Treen, 407 So. 2d 671 \(La. 1981\).](#)

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<sup>[FN2]</sup> [§ 206.](#)

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<sup>[FN3]</sup> [In re Recall Charges Against Seattle School Dist. No. 1 Directors, 162 Wash. 2d 501, 173 P.3d 265, 228 Ed. Law Rep. 482 \(2007\).](#)

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<sup>[FN4]</sup> [In re Shipman, 125 Wash. 2d 683, 886 P.2d 1127 \(1995\).](#)

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<sup>[FN5]</sup> [Davis v. Shavers, 263 Ga. 785, 439 S.E.2d 650 \(1994\).](#)

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<sup>[FN6]</sup> [§ 202.](#)

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<sup>[FN7]</sup> [In re Recall of Davis, 164 Wash. 2d 361, 193 P.3d 98 \(2008\).](#)

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<sup>[FN8]</sup> [In re Recall of Robinson, 156 Wash. 2d 704, 132 P.3d 124 \(2006\).](#)

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<sup>[FN9]</sup> [Matter of Lee, 122 Wash. 2d 613, 859 P.2d 1244 \(1993\).](#)

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<sup>[FN10]</sup> [Janovich v. Herron, 91 Wash. 2d 767, 592 P.2d 1096 \(1979\).](#)

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[\[FN11\] In re Recall Charges Against Seattle School Dist. No. 1 Directors, 162 Wash. 2d 501, 173 P.3d 265, 228 Ed. Law Rep. 482 \(2007\).](#)

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[\[FN12\] CAPS v. Board Members, 113 N.M. 729, 832 P.2d 790, 75 Ed. Law Rep. 1211 \(1992\).](#)

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2. Procedure

a. In General

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**§ 205. Generally**

**West's Key Number Digest**

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The failure to comply with provisions of a recall statute is fatal to any recall attempt where the basis for the procedure is purely statutory<sup>[FN1]</sup> or where the recall right stems from a constitutional provision.<sup>[FN2]</sup>

In some jurisdictions, no recall of a public officer is permitted until an officer has held office for a certain amount of time,<sup>[FN3]</sup> and particular requirements may apply as to the time of filing the petition for recall.<sup>[FN4]</sup>

Under constitutional provisions in some states, if the officer does not resign within a specified number of days after the petition for recall is filed, a special election will be ordered to be held within a specified period after the issuance of the call for such election, in the state, county, district, or municipality electing such officer, to determine whether the people will recall such officer.<sup>[FN5]</sup>

**Practice Tip:** Well-meaning citizens who fail in their attempt to exercise their constitutional right to recall an elected official are subject to an award of costs.<sup>[FN6]</sup>



State statutes sometimes include in the procedure for initiating and carrying out a recall petition the filing of a notice of intent to circulate such petition, which must meet statutorily specified requirements.[FN7]

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[FN1] [State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965 \(1982\).](#)

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[FN2] [Fiannaca v. Gill, 78 Nev. 337, 372 P.2d 683 \(1962\).](#)

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[FN3] [State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965 \(1982\).](#)

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[FN4] [§ 207.](#)

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[FN5] [Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 \(1994\).](#)

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[FN6] [Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 \(1994\).](#)

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[FN7] [Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 \(1994\).](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

G. Recall

2. Procedure

a. In General

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**§ 206. Petition for recall and accompanying affidavit**

**West's Key Number Digest**

## A.L.R. Library

[Constitutionality of State and Local Recall Provisions, 13 A.L.R.6th 661](#)

### Forms

[Am. Jur. Legal Forms 2d § 213:56](#) (Form drafting guide—Checklist—Matters to be considered when drafting a petition for recall)

[Am. Jur. Legal Forms 2d § 213:57](#) (Petition for recall)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 27](#) (Petition or application—By electors—For recall of public official)

The required form and contents of a petition for the recall of a public officer may be prescribed in the provision authorizing the recall proceeding, and the petition for a recall must in substance conform to these requirements.[FN1] Some jurisdictions require that the removal petition contain good and sufficient reason for removal.[FN2]

Statutes sometimes require that the reasons for recall must be stated clearly,[FN3] or that the grounds be stated with particularity.[FN4] All that is required concerning the statutory requirement of clarity regarding a recall petition is that the reason for recall be stated with sufficient clarity to enable the officer and electors to identify the transaction and know the charges made in connection therewith.[FN5] A meticulous and detailed statement of the charges against an officeholder is not required in a recall petition, and it is sufficient if an officeholder is apprised of the course of conduct in office that is the basis of the recall drive, so that a defense can be mounted regarding that conduct.[FN6] Or, as sometimes stated, the charges must be made with sufficient precision and detail to enable the electorate and the challenged official to make informed decisions in the recall process, and although charges may contain some conclusions, they must state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office.[FN7] Constitutional provisions may mandate that the petition set forth the reasons why such recall was demanded and may impose a limit on the length of such petition.[FN8] Truth itself is not a consideration in determining the clarity of recall petition language.[FN9]

**Observation:** Where the clarity of the reasons stated in the petition to recall a public officeholder is a close question, doubt should be resolved in favor of the individual formulating the petition.[FN10]

Where petitioners are required to state only generally their grounds or reasons for demanding a recall, the petition need not state the cause for removal with the same particularity as would be necessary in a pleading in a judicial proceeding.[FN11]

In some jurisdictions, where a statement of grounds for removal is required to be included in the recall affidavit accompanying the petition, the affidavit must sufficiently set forth a violation of some duty to the electorate that is sufficiently identifiable for the electorate to determine the truth or falsity of the charge, and should apprise the official of charges he or she is expected to meet if a recall election is held.[FN12] Furthermore, where good and sufficient reason is required as a basis for recall, the recall petition must set forth reasons related to official duties with sufficient specificity to give notice to the official so that he or she can respond to the electors.[FN13]

A recall statute may require that recall petitions each be individuated, be concerned with a specific official, and give that official the right to include his or her own answer to the recall petition.[\[FN14\]](#) The purpose of such statutes is to require potential petition signers to judge each specific official on his or her own individual merits after being exposed to both sides of the question of whether he or she should be recalled.[\[FN15\]](#)

If the legislature has incorporated into a statute a list of grounds for which an officer may be subject to a recall election, a petition that states one of the grounds is statutorily sufficient to compel a recall election.[\[FN16\]](#)

Statutes sometimes require that the recall petition contain a statement of the minimum number of signatures necessary to the validity of the petition.[\[FN17\]](#)

**Practice Tip:** The proper remedy when a recall petition is deficient is injunction, rather than a writ of prohibition.[\[FN18\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

A charge in a petition to recall an elected official is legally sufficient if the charge defines substantial conduct clearly amounting to misfeasance, malfeasance, or a violation of the oath of office, and there is no legal justification for the challenged conduct. [In re Recall of Telford, 166 Wash. 2d 148, 206 P.3d 1248 \(2009\).](#)

### [END OF SUPPLEMENT]

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[\[FN1\]](#) [Wallace v. Tripp, 358 Mich. 668, 101 N.W.2d 312 \(1960\).](#)

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[\[FN2\]](#) [In re Recall of Certain Officials of City of Delafield, 63 Wis. 2d 362, 217 N.W.2d 277 \(1974\).](#)

- As to grounds for recall, generally, see [§ 204](#).

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[\[FN3\]](#) [Molitor v. Miller, 102 Mich. App. 344, 301 N.W.2d 532 \(1980\).](#)

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[\[FN4\]](#) [von Stauffenberg v. Committee for Honest and Ethical School Bd., 903 P.2d 1055, 104 Ed. Law Rep. 481 \(Alaska 1995\).](#)

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[\[FN5\]](#) [Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 \(2008\).](#)

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[\[FN6\]](#) [Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 \(2008\).](#)

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[\[FN7\]](#) [Matter of Lee, 122 Wash. 2d 613, 859 P.2d 1244 \(1993\).](#)

- Voters may draw reasonable inferences from the facts alleged in a recall petition, and the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations. [In re Recall of West, 155 Wash. 2d 659, 121 P.3d 1190 \(2005\).](#)

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[\[FN8\]](#) [Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 \(1994\) \(200 words\).](#)

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[\[FN9\]](#) [Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 \(2008\).](#)

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[FN10] [Donigan v. Oakland County Election Com'n](#), 279 Mich. App. 80, 755 N.W.2d 209 (2008).

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[FN11] [Joyner v. Shuman](#), 116 So. 2d 472 (Fla. Dist. Ct. App. 2d Dist. 1959); [In re Bower](#), 91 Ill. App. 2d 63, 233 N.E.2d 225 (5th Dist. 1967), judgment aff'd, 41 Ill. 2d 277, 242 N.E.2d 252 (1968).

- As to pleadings in judicial proceedings, generally, see [Am. Jur. 2d, Pleadings §§ 1 et seq.](#)

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[FN12] [Gilbert v. Morrow](#), 277 So. 2d 812 (Fla. Dist. Ct. App. 1st Dist. 1973).

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[FN13] [In re Recall of Certain Officials of City of Delafield](#), 63 Wis. 2d 362, 217 N.W.2d 277 (1974).

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[FN14] [Capo for Better Representation v. Kelley](#), 158 Cal. App. 4th 1455, 71 Cal. Rptr. 3d 354, 228 Ed. Law Rep. 838 (4th Dist. 2008).

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[FN15] [Capo for Better Representation v. Kelley](#), 158 Cal. App. 4th 1455, 71 Cal. Rptr. 3d 354, 228 Ed. Law Rep. 838 (4th Dist. 2008).

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[FN16] [State ex rel. Lottman v. Board of Ed. of School Dist. No. 103](#), 201 Neb. 486, 268 N.W.2d 435 (1978).

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[FN17] [Foley v. Kennedy](#), 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (1994).

- As to requirements concerning the number of persons signing the petition, generally, see [§ 208](#).

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[FN18] [Sheehy v. Ferda](#), 235 Mont. 63, 765 P.2d 722 (1988).

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

G. Recall

2. Procedure

a. In General

**§ 207. Limitations on time of filing petition; abandonment by laches**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 70.7

Statutes have sometimes required the circulation and filing of a recall petition before a specified time period immediately preceding the regular forthcoming general election,[[FN1](#)] or have provided that no recall petition may be filed against an officer until he or she has held office for a specified time period.[[FN2](#)] In some jurisdictions, where a notice of intent to file a recall petition is filed, it is statutorily required that the petition be submitted within a specified time after the filing of the notice.[[FN3](#)]

A recall petition is deemed abandoned by laches when the recall petitioners do not actively pursue their remedies so as to require compliance with the mandatory statutory requirements that recall elections be held expeditiously within a limited period after the recall petition is first presented for processing to government authorities.[[FN4](#)]

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[[FN1](#)] [Janovich v. Herron](#), 91 Wash. 2d 767, 592 P.2d 1096 (1979).

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[[FN2](#)] [State ex rel. Palmer v. Hart](#), 201 Mont. 526, 655 P.2d 965 (1982) (2 months).

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[[FN3](#)] [Foley v. Kennedy](#), 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (1994) (60 days).

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[[FN4](#)] [Ponds v. Treen](#), 407 So. 2d 671 (La. 1981).

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

[Topic Summary](#) [Correlation Table](#) [References](#)

## § 208. Persons signing petition; numerical requirements

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 70.7

### Forms

[Am. Jur. Legal Forms 2d § 213:59](#) (Certificate stating number of qualified signers of recall petition)

Constitutional provisions have sometimes specified the number and nature of persons who must sign a petition for recall, and in this regard, specific constitutional provisions have provided that—  
— registered voters in a number not less than 25% of the number who actually voted in the state, county, district, or municipality electing the officer in question, at the preceding general election, were required to file their petition, in the manner provided by the provision, demanding his or her recall by the people.[\[FN1\]](#)

— the legislative body of any county, city and county, or city and town authorized to provide for the manner of exercising recall powers in the applicable subdivisions, may not require any such recall to be signed by electors more in number than 25% of the entire vote cast at the last preceding election for all the candidates for office that the incumbent sought to be recalled occupies.[\[FN2\]](#)

Statutes sometimes require that a signer of a recall petition specify the signer's place of residence in order to be valid.[\[FN3\]](#)

**Practice Tip:** An argument that citizens were entitled to relief on the grounds that they reasonably and detrimentally relied upon advice they received from the state registrar's office concerning the number of signatures required for a valid recall petition, and that the principle of equitable estoppel applied to require the Registrar or the state to accept their recall petition and go forward with the recall election, has been rejected.[\[FN4\]](#)

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[\[FN1\]](#) [Foley v. Kennedy](#), 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (1994).

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[\[FN2\]](#) [Shroyer v. Sokol](#), 191 Colo. 32, 550 P.2d 309 (1976).

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[\[FN3\]](#) [Stone v. Wyckoff](#), 102 N.J. Super. 26, 245 A.2d 215 (App. Div. 1968).

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[\[FN4\]](#) [Foley v. Kennedy](#), 110 Nev. 1295, 885 P.2d 583, 95 Ed. Law Rep. 1085 (1994).

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G. Recall

2. Procedure

a. In General

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**§ 209. Form, validity, and withdrawal of, signatures**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

Where a recall statute requires the signatures on recall petitions to be compared with the signatures on voter registration cards, a signature verification method used that does not involve comparing a signature with the registration card on file is improper and fatal to the recall petition.<sup>[FN1]</sup> A signature on a petition need not, however, be identical in form to the signature on the original voter registration ledger,<sup>[FN2]</sup> and a clerk's action in rejecting signatures as illegible is arbitrary.<sup>[FN3]</sup> Once the issue of the validity of a signature on a recall petition reaches a judicial tribunal, a signature consistent with that of the registered voter, of one residing at the recorded address of the registrant, must be deemed prima facie that of the registered voter, and the burden is on any challenger to show the contrary.<sup>[FN4]</sup>

**Observation:** In some jurisdictions, a signature may not be withdrawn after the filing of a recall petition.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965 \(1982\).](#)

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<sup>[FN2]</sup> [Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 \(App. Div. 1968\).](#)

- A statutory requirement that the elector sign his or her name as it appears on the registration books and that the elector or the person circulating the petition print the name of the elector below the elector's signature is not to preclude any person whose signature on the registration book varies from his or her name as printed or typed on the registration books from participating in the recall of public officials, but is to make sure that only eligible

electors' names appear on the recall petition by the printing of the name either as it appears in print or in signature on the registration book. [Segars v. Bramlett, 245 Ga. 386, 265 S.E.2d 279 \(1980\).](#)

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[FN3] [Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 \(App. Div. 1968\).](#)

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[FN4] [Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 \(App. Div. 1968\).](#)

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[FN5] [In re Struck, 41 Ill. 2d 574, 244 N.E.2d 176 \(1969\); Coghlan v. Cuskelly, 62 N.D. 275, 244 N.W. 39 \(1932\); State ex rel. Postlethwait v. Clark, 143 Or. 482, 22 P.2d 900 \(1933\).](#)

- As to the withdrawal of signatures to a petition in an initiative or referendum proceeding, see [Am. Jur. 2d, Initiative and Referendum § 30.](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment

G. Recall

2. Procedure

a. In General

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**§ 210. Affidavit of circulator of petition**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.7](#)

**Forms**

[Am. Jur. Legal Forms 2d § 213:58](#) (Affidavit of circulator of recall petition)



The circulator of a recall petition may be required to attach an affidavit to each separate page of the petition for the purpose of verifying signatures and voting status.[FN1] Under a statute requiring the circulator's affidavit to appear on each paper, however, the requirement is satisfied where a single affidavit is made on the last page of a petition containing several stapled sheets, and the circulator need not affix an affidavit to each signature page.[FN2] An oath that does not meet the statutory requirements renders the petitions insufficient.[FN3] Where verification by affidavit is required, and a statute provides that a written declaration under penalty of perjury may take the place of an affidavit, such written declaration must conform to the statutory requirements for such a declaration or the page of the petition to which it is appended will be invalidated.[FN4]

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[FN1] [Dodge v. Free, 32 Cal. App. 3d 436, 108 Cal. Rptr. 311 \(4th Dist. 1973\).](#)

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[FN2] [Stone v. Wyckoff, 102 N.J. Super. 26, 245 A.2d 215 \(App. Div. 1968\).](#)

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[FN3] [Hazelwood v. Saul, 619 P.2d 499 \(Colo. 1980\).](#)

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[FN4] [Dodge v. Free, 32 Cal. App. 3d 436, 108 Cal. Rptr. 311 \(4th Dist. 1973\).](#)

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b. Review and Certification of Petition or Application Therefor

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**§ 211. Official's determination and certification of sufficiency of petition**

**West's Key Number Digest**

## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 29](#) (Petition or application—For writ of mandamus—To compel city clerk to submit certification of recall petition to city council—To compel city council to hold recall election)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 30](#) (Petition or application—For writ of mandamus—To compel certification of recall petition—Allegation—Arbitrary failure to count valid signatures)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 33](#) (Judgment or decree—Granting peremptory writ of mandamus—Compelling certification of recall petition—Compelling special election)

It has sometimes been required that a designated officer certify a recall petition within a specified time.<sup>[FN1]</sup> After a certificate has been issued it becomes the ministerial duty of the clerk to file the petitions with the certificate.<sup>[FN2]</sup>

A state attorney general improperly issued an opinion that disqualified recall petitions circulated by deputy registrars, which resulted in a recall election effort being terminated, where the opinion was contrary to state law, denied equal protection to voters who signed the petitions circulated by registrars, and denied them due process and the First Amendment rights to the petition and to associate for the advancement and expression of political beliefs.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [State ex rel. Baggett v. Long, 60 So. 2d 96 \(La. Ct. App. 1st Cir. 1952\).](#)

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<sup>[FN2]</sup> [Baroldi v. Denni, 197 Cal. App. 2d 472, 17 Cal. Rptr. 647 \(4th Dist. 1961\).](#)

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<sup>[FN3]</sup> [Pena v. Nelson, 400 F. Supp. 493 \(D. Ariz. 1975\).](#)

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**§ 212. Judicial review; petition, allegations, and grounds asserted therein**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 70.7

Review by the courts of a petition to recall a public officeholder is generally limited.[FN1] Courts do not strike recall petitions on merely technical grounds.[FN2]

The court's central purpose in the process to recall an elected official is to determine whether the charges are factually and legally sufficient.[FN3] As to the factual sufficiency of the charges in a recall action, the court must inquire into whether the charges state, in detail, the acts complained of, as well as whether they demonstrate that the petitioner knows of identifiable facts that support the charge.[FN4] Charges in a recall petition are factually sufficient to justify a recall when, taken as a whole, they state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance.[FN5] "Legal sufficiency" means the charge must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.[FN6]

**Observation:** An alleged factual insufficiency in a recall petition may be, in the judge's sound discretion, cured by consideration of supplemental documentation, so long as the elected official has sufficient actual notice to meaningfully respond to the factual allegations supported by the proffered supplementation.[FN7]

In some jurisdictions, a court has jurisdiction only to determine whether a petition states causes for recall.[FN8] In this regard, the view has been followed that where the requirement is that the petition for recall of a public officer state clearly the reason for recall, an aggrieved official may petition the court prior to election for prompt judicial determination of the clarity, but not the sufficiency, of the grounds.[FN9] Under this view, if any one allegation contained in a petition is sufficiently clear, the petition must be upheld.[FN10]

In some jurisdictions, however, whether the allegations in a recall petition are legally sufficient is a matter of law for a district court to decide,[FN11] and, under provisions authorizing a recall for malfeasance or misfeasance in office, or a violation of an oath of office,[FN12] or for good and sufficient reason,[FN13] the view has been taken in some cases that the sufficiency of the grounds stated is a question for the court. In considering the sufficiency of grounds for recall under such provisions, courts are limited to examining charges stated, cannot inquire into extraneous factual matters, must assume the truth of the charges, and may not inquire into the motives of those filing charges.[FN14] Recall statutes do not contemplate a judicial inquiry into the truth of specific charges of misconduct of a public officer,[FN15] and it is not the role of the courts, but rather that of the voters, to assess the truth or falsity of the allegations in a petition for recall.[FN16] A court only considers whether, accepting the allegations as true, the charges on their face support the conclusion that the officer abused his or her position.[FN17]

**Practice Tip:** Where a statute requires review of rulings on the sufficiency of charges contained in a recall petition within a specified number of days of receipt of notice of such rulings, the trial court is without jurisdiction to review such rulings if they are not challenged within the prescribed time period.[FN18]

[\[FN1\] Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 \(2008\); In re Recall of Carkeek, 156 Wash. 2d 469, 128 P.3d 1231 \(2006\).](#)

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[\[FN2\] In re Recall of Carkeek, 156 Wash. 2d 469, 128 P.3d 1231 \(2006\).](#)

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[\[FN3\] In re Recall of Young, 152 Wash. 2d 848, 100 P.3d 307 \(2004\).](#)

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[\[FN4\] In re Recall of Reed, 156 Wash. 2d 53, 124 P.3d 279 \(2005\).](#)

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[\[FN5\] In re Recall of West, 155 Wash. 2d 659, 121 P.3d 1190 \(2005\).](#)

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[\[FN6\] In re Recall of Robinson, 156 Wash. 2d 704, 132 P.3d 124 \(2006\).](#)

- Charges in a recall petition are legally insufficient where the conduct is "insubstantial" or if the elected official acted with a legal justification. [In re Recall Charges Against Seattle School Dist. No. 1 Directors, 162 Wash. 2d 501, 173 P.3d 265, 228 Ed. Law Rep. 482 \(2007\).](#)

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[\[FN7\] In re Recall of West, 155 Wash. 2d 659, 121 P.3d 1190 \(2005\).](#)

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[\[FN8\] In re Carlson, 147 Wis. 2d 630, 433 N.W.2d 635 \(Ct. App. 1988\).](#)

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[\[FN9\] Noel v. Oakland County Clerk, 92 Mich. App. 181, 284 N.W.2d 761 \(1979\).](#)

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[\[FN10\] Molitor v. Miller, 102 Mich. App. 344, 301 N.W.2d 532 \(1980\).](#)

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[\[FN11\] Sheehy v. Ferda, 235 Mont. 63, 765 P.2d 722 \(1988\).](#)

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[\[FN12\] Cole v. Webster, 103 Wash. 2d 280, 692 P.2d 799, 22 Ed. Law Rep. 489 \(1984\).](#)

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[\[FN13\] In re Recall of Certain Officials of City of Delafield, 63 Wis. 2d 362, 217 N.W.2d 277 \(1974\).](#)

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[\[FN14\] Janovich v. Herron, 91 Wash. 2d 767, 592 P.2d 1096 \(1979\).](#)

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[\[FN15\] Roberts v. Brown, 43 Tenn. App. 567, 310 S.W.2d 197 \(1957\); In re Recall of Davis, 164 Wash. 2d 361, 193 P.3d 98 \(2008\); Beckstrom v. Kornsi, 63 Wis. 2d 375, 217 N.W.2d 283 \(1974\).](#)

- In reviewing the legal sufficiency of allegations in recall petitions, the Supreme Court of Alaska is in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim and the court therefore has to take the allegations as true. [von Stauffenberg v. Committee for Honest and Ethical School Bd., 903 P.2d 1055, 104 Ed. Law Rep. 481 \(Alaska 1995\).](#)

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[\[FN16\] von Stauffenberg v. Committee for Honest and Ethical School Bd., 903 P.2d 1055, 104 Ed. Law Rep. 481 \(Alaska 1995\); Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 \(2008\); Matter of Recall of Call, 109 Wash. 2d 954, 749 P.2d 674 \(1988\); Matter of Recall of Redner, 153 Wis. 2d 383, 450 N.W.2d 808 \(Ct. App. 1989\).](#)

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[\[FN17\] In re Recall of Davis, 164 Wash. 2d 361, 193 P.3d 98 \(2008\).](#)

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[\[FN18\] Herron v. McClanahan, 28 Wash. App. 552, 625 P.2d 707 \(Div. 2 1981\).](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
H. Impeachment

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## Research References

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### Primary Authority

[U.S. Const. Art. I, § 2, cl. 5](#)

[U.S. Const. Art. I, § 3, cl. 6, 7](#)

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Public Officers and Employees

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
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## § 213. Generally; proceedings

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [70.5](#)

As a rule, impeachment is exclusively a matter for action by the legislative branch.[FN1] In addition, where the constitution confers exclusive jurisdiction over impeachment on the legislature, in the absence of provisions to the contrary, courts have no jurisdiction over, or power to interfere in, impeachment cases.[FN2]

Under the United States Constitution, the House of Representatives has the sole power of impeachment,[FN3] and the Senate has the sole power to try all such impeachments.[FN4] Furthermore, no person will be convicted without the concurrence of two-thirds of the Senate members present.[FN5]

The fact that the chief justice of a state supreme court presides when an impeachment occurs in no way changes the proceeding from a legislative to a judicial one.[FN6] Further, in this regard, the United States Constitution provides that when the President of the United States is tried, the Chief Justice of the Supreme Court will preside.[FN7]

An impeachment proceeding, while penal in nature,[FN8] has been said to be neither exclusively civil nor criminal.[FN9] In at least one state an impeachment trial is conducted in the manner of a civil proceeding, and the standard of proof for a conviction of impeachment is clear and convincing evidence.[FN10] Because a criminal conviction is not at stake in an impeachment proceeding, a "beyond a reasonable doubt" standard of proof is not required.[FN11]

Statutes in some jurisdictions provide that impeachment proceedings against particular officers may be instituted by a specified number of taxpayers upon giving bond, with sufficient sureties, payable to the officer sought to be impeached, conditioned to prosecute the impeachment to effect and, failing therein, to pay all costs

that may be incurred, and that when taxpayers institute such proceedings, the costs will be given against the unsuccessful party, to be collected by execution.[FN12]

**Practice Tip:** Where a state constitution gives the legislature the sole power to conduct impeachment proceedings, statutes granting legal representation to a state employee in any action or suit against him or her do not apply to impeachment proceedings.[FN13]

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[FN1] Rockefeller v. Hogue, 244 Ark. 1029, 429 S.W.2d 85 (1968); In re Mussman, 112 N.H. 99, 289 A.2d 403, 53 A.L.R.3d 877 (1972).

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[FN2] State v. McCarthy, 255 Wis. 234, 38 N.W.2d 679 (1949).

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[FN3] U.S. Const. Art. I, § 2, cl. 5.

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[FN4] U.S. Const. Art. I, § 3, cl. 6.

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[FN5] U.S. Const. Art. I, § 3, cl. 6.

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[FN6] In re Mussman, 112 N.H. 99, 289 A.2d 403, 53 A.L.R.3d 877 (1972) (impeachment of the governor).

- As to the eligibility, election, qualification, and tenure of state governors, generally, see Am. Jur. 2d, Governor § 2.

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[FN7] § 215.

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[FN8] State ex rel. Munchus v. Conradi, 642 So. 2d 467, 94 Ed. Law Rep. 1072 (Ala. 1994).

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[FN9] Lewis v. State ex rel. Evans, 387 So. 2d 795 (Ala. 1980).

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[FN10] Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 (2006).

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[FN11] Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 (2006).

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[FN12] State ex rel. Munchus v. Conradi, 642 So. 2d 467, 94 Ed. Law Rep. 1072 (Ala. 1994) (city officer).

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[FN13] Mayo v. State, 138 Vt. 419, 415 A.2d 1061 (1980).

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**§ 214. Effect on other remedies**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 70.5

The remedy of impeachment is not exclusive of any other public remedy for the same misbehavior.[[FN1](#)] In this regard, under the Federal Constitution, a party convicted for impeachment will nevertheless be liable and subject to indictment, trial, judgment and punishment, according to the law.[[FN2](#)] However, it has been said that where a state constitution fixes the term of a public officer and provides for the officer's removal by impeachment, impeachment is the sole remedy to effect removal from office.[[FN3](#)]

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[[FN1](#)] [Shusted v. Coyle, 139 N.J. Super. 314, 353 A.2d 562 \(Law Div. 1976\).](#)

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[[FN2](#)] [U.S. Const. Art. I, § 3, cl. 7.](#)

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[[FN3](#)] [Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 \(Me. 1975\); Shusted v. Coyle, 139 N.J. Super. 314, 353 A.2d 562 \(Law Div. 1976\).](#)

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**§ 215. Persons subject to impeachment**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.5](#)

In some jurisdictions, a constitutional provision regarding impeachment of state officers relates only to officers provided for in the constitution or elected by the people at large,[[FN1](#)] while in other jurisdictions, a person must be an officer under the state constitution in order to be impeachable.[[FN2](#)]

A state senate has no jurisdiction to impeach a former officeholder who has effectively relinquished his or her office prior to the commencement of impeachment proceedings.[[FN3](#)]

Federal officers[[FN4](#)] including the President,[[FN5](#)] are subject to impeachment.

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[[FN1](#)] [State ex rel. Ralston v. Blain, 189 Kan. 575, 370 P.2d 415, 92 A.L.R.2d 1115 \(1962\).](#)

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[[FN2](#)] [Smith v. Brantley, 400 So. 2d 443 \(Fla. 1981\).](#)

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[[FN3](#)] [Smith v. Brantley, 400 So. 2d 443 \(Fla. 1981\).](#)

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[[FN4](#)] [U.S. Const. Art. I, § 2, cl. 5; U.S. Const. Art. I, § 3, cl. 6.](#)

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[[FN5](#)] [U.S. Const. Art. I, § 3, cl. 6.](#)

- As to the President, generally, see [Am. Jur. 2d, United States §§ 17 et seq.](#)

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**§ 216. Grounds; conduct before entry into office or during prior term**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 70.5

**A.L.R. Library**

[Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691](#)

An act or omission for which an officer may be impeached and removed from office must relate to the duties of the office.[[FN1](#)]

The refusal or neglect of an officer to perform his or her official duties pertaining to his or her office may be a ground for impeachment, although a failure to perform just one duty required by law would not be sufficient to uphold the action, as there would have to be a general failure to perform official duties.[[FN2](#)]

An "impeachable high crime or misdemeanor" is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.[[FN3](#)] The phrase "misdemeanor in office," as that phrase is used in a state constitution to define an impeachable offense, is a term of art, and the word "misdemeanor" in this phrase is not used as it is in a criminal context, and an officer's conduct need not rise to the level of an indictable offense to be considered an impeachable offense.[[FN4](#)]

According to some authorities, a public officer may not be impeached for acts committed before his or her entry into office.[[FN5](#)] Thus, an officer may not be impeached for acts that occurred after his or her election to office, but prior to the actual commencement of his or her term and actual assumption of duties.[[FN6](#)] In addition, where constitutional provisions expressly limit the penalty for misconduct to the term of office during which the misconduct occurs, an officer may not be impeached for an act committed during a prior term.[[FN7](#)]

**Observation:** While the acts of an officer during a previous term may not be grounds for impeachment, they may be considered insofar as they are connected with or bear upon the officer's general course of conduct during his or her present term, for the limited purpose of inquiring into his or her motive and intent as to the acts and omissions charged to the officer during his or her second term.[[FN8](#)]

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[[FN1](#)] [Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 \(2006\).](#)

[\[FN2\] State ex rel. Ayer v. Ewing, 231 Ind. 1, 106 N.E.2d 441 \(1952\).](#)

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[\[FN3\] Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 \(2006\).](#)

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[\[FN4\] Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 \(2006\).](#)

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[\[FN5\] Wysong v. Walden, 120 W. Va. 122, 52 S.E.2d 392 \(1938\).](#)

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[\[FN6\] Parker v. State, 333 So. 2d 806 \(Ala. 1976\).](#)

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[\[FN7\] Parker v. State, 333 So. 2d 806 \(Ala. 1976\).](#)

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[\[FN8\] State ex rel. Turner v. Earle, 295 So. 2d 609 \(Fla. 1974\).](#)

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## **§ 217. Consequences of impeachment**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [70.5](#)

A judgment on impeachment normally extends only to one's removal from office and disqualification from holding office.[\[FN1\]](#) Under the United States Constitution, judgment in cases of impeachment may not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.[\[FN2\]](#)

Where a constitutional provision provides that disqualification from future officeholding is discretionary and not, like removal, an automatic consequence of impeachment, impeachment is not available simply to disqualify a person who has resigned from office from future officeholding.[\[FN3\]](#)

A state constitution may provide that a conviction of impeachment is not the same as a criminal conviction and that impeachment sanctions cannot rise to the level of criminal punishment.[\[FN4\]](#)

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[\[FN1\]](#) [Mayo v. State, 138 Vt. 419, 415 A.2d 1061 \(1980\).](#)

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[\[FN2\]](#) [U.S. Const. Art. I, § 3, cl. 7.](#)

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[\[FN3\]](#) [Smith v. Brantley, 400 So. 2d 443 \(Fla. 1981\).](#)

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[\[FN4\]](#) [Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 720 N.W.2d 372, 212 Ed. Law Rep. 434 \(2006\).](#)

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## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [65](#), [69.12](#), [71](#)

## Primary Authority

[5 U.S.C.A. § 7532\(a\)](#)

## A.L.R. Library

A.L.R. Index, Impeachment of Officers

A.L.R. Index, Public Officers and Employees

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## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 60, 64](#)

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**§ 218. Generally**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 65, 69.12, 71

The suspension of public officers is a matter separate and apart from their removal, and in case of a suspension, the officer is not removed, but is merely prevented for the time being from performing the functions of his or her office.[\[FN1\]](#) Although the same offense may be a proper ground for either a suspension or a dismissal of a state employee, a state statute and the administrative rules may contemplate that these are mutually exclusive disciplinary alternatives.[\[FN2\]](#) Furthermore, suspension may be proper where the remedy of removal is deemed too harsh for the conduct involved.[\[FN3\]](#)

Suspension does not create a vacancy which may be filled by appointment,[\[FN4\]](#) or impose disqualification from being elected to a future term of the same office.[\[FN5\]](#)

**Practice Tip:** If the suspension of a public employee is contingent upon approval by an official or board after notice and hearing, then the ultimate judgment of such official or board, based on the showing made at the hearing, is subject to appropriate judicial review.[\[FN6\]](#)

For purposes of a state statutory provision for placement on a re-employment list after a layoff, a "layoff" is a separation from state service by reason of the state's economic situation as opposed to disability.[\[FN7\]](#)

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[\[FN1\] Griffin v. Denton, 61 Ariz. 454, 150 P.2d 96 \(1944\).](#)

- As to procedures, review, and remedies for, suspension, see §§ [440](#), [453](#), [465](#).
- As to removal or discharge from public office or employment, generally, see [§§ 168 et seq.](#)
- As to suspension of judges, see [Am. Jur. 2d, Judges § 20](#).
- As to suspension of municipal employees, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 267, 268](#).
- As to suspension of police officers, generally, see [Am. Jur. 2d, Sheriffs, Police, and Constables § 19](#).
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[\[FN2\] State, Dept. of Transp. v. State, Career Service Commission, 366 So. 2d 473 \(Fla. Dist. Ct. App. 1st Dist. 1979\).](#)

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[\[FN3\] Brown v. Ohio Bur. of Emp. Serv., 70 Ohio St. 3d 1, 1994-Ohio-156, 635 N.E.2d 1230 \(1994\).](#)

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[\[FN4\] State ex rel. Carlson v. Strunk, 219 Minn. 529, 18 N.W.2d 457 \(1945\); Paull v. Pierce, 68 N.J. Super. 521, 172 A.2d 721 \(Law Div. 1961\).](#)

- As to vacancies in office, generally, see [§§ 104 et seq.](#)
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[\[FN5\] State ex rel. Chitwood v. Murley, 202 Tenn. 637, 308 S.W.2d 405 \(1957\).](#)

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[\[FN6\] De Groot v. Sheffield, 95 So. 2d 912 \(Fla. 1957\).](#)

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[\[FN7\] Ruffin v. Department of Public Works, 50 Conn. Supp. 98, 914 A.2d 617 \(Super. Ct. 2006\).](#)

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**§ 219. Basis and extent of authority to suspend**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 65, 69.12, 71

The power to suspend a public employee is sometimes based on statutory authority.[FN1] The power to suspend a public officer or employee is generally considered as included in the power to remove that individual.[FN2] There is also authority for the view, however, that, absent specific statutory authority to do so, a public employer may not suspend an employee, even where it has power to terminate his or her employment permanently, since the power to suspend is not an inherent lesser power included within the power to terminate public employment.[FN3] Furthermore, where the power to remove at will or at pleasure exists, it has been observed that the power to suspend is not necessary and does not exist.[FN4] In addition, the indefinite suspension of a public officer, without pay, has not been considered to be within the general power of removal.[FN5]

It has been said that the fact that a state constitution provides the legislature with the means to remove a particular public officer by impeachment, does not preclude a state supreme court from exercising its inherent power to protect itself and the public, and administer justice by suspending such an officer where he or she has been indicted for serious crimes.[FN6]

The summary suspension of a federal employee is available only when there has been an allegation of a serious crime, and only when the misconduct alleged bears a sufficient relationship to the employee's duties in the agency to warrant action as promoting the efficiency of the service.[FN7] While a summary suspension of a federal employee may be indefinite, it is not unlimited, and an agency may suspend an employee pending the outcome of criminal proceedings, but then the agency must terminate the suspension within a reasonable amount of time after resolution of the criminal charges.[FN8]

An indefinite suspension is to be imposed only as an emergency measure.[FN9] To impose an indefinite suspension on a federal employee with a shortened notice period, (1) an agency must have reasonable cause to believe that the employee committed a crime for which a sentence of imprisonment could be imposed, and (2) the suspension must promote the efficiency of the service.[FN10] To show that a suspension promotes the

efficiency of the service, an agency must establish a nexus between the employee's alleged acts of misconduct and the efficiency of the service.[\[FN1\]](#) Although an exact duration for an indefinite suspension may not be ascertainable, a condition subsequent must exist that terminates the employee's suspension, and once the condition subsequent has occurred, the agency must terminate the suspension within a reasonable amount of time.[\[FN12\]](#)

**Observation:** An inquiry into the propriety of an agency's failure to terminate an employee's indefinite suspension looks to facts and events that occur after the suspension was imposed. An inquiry into the propriety of an agency's imposition of an indefinite suspension looks only to facts relating to events prior to suspension that are proffered to support such an imposition, and facts and events that occur after the suspension has been imposed have no bearing on such an inquiry.[\[FN13\]](#)

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[\[FN1\] § 220.](#)

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[\[FN2\] McGonigle v. Governor, 418 Mass. 147, 634 N.E.2d 1388 \(1994\); State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 \(1956\); Barnes v. Ingram, 217 Tenn. 363, 397 S.W.2d 821 \(1965\).](#)

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[\[FN3\] Whelan v. Pitts, 150 A.D.2d 380, 540 N.Y.S.2d 536 \(2d Dep't 1989\).](#)

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[\[FN4\] State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 \(1956\); Barnes v. Ingram, 217 Tenn. 363, 397 S.W.2d 821 \(1965\).](#)

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[\[FN5\] State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 \(1956\); Barnes v. Ingram, 217 Tenn. 363, 397 S.W.2d 821 \(1965\).](#)

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[\[FN6\] Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 \(1991\)](#) (suspension of judge).

- As to impeachment, generally, see [§§ 213 et seq.](#)

- As to the suspension of judges, see [Am. Jur. 2d, Judges § 20.](#)

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[\[FN7\] Morrison v. National Science Foundation, 423 F.3d 1366 \(Fed. Cir. 2005\).](#)

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[\[FN8\] Morrison v. National Science Foundation, 423 F.3d 1366 \(Fed. Cir. 2005\).](#)

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[\[FN9\] Morrison v. National Science Foundation, 423 F.3d 1366 \(Fed. Cir. 2005\).](#)

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[\[FN10\] Morrison v. National Science Foundation, 423 F.3d 1366 \(Fed. Cir. 2005\).](#)

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[\[FN11\] Morrison v. National Science Foundation, 423 F.3d 1366 \(Fed. Cir. 2005\).](#)

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[\[FN12\] Rhodes v. Merit Systems Protection Bd., 487 F.3d 1377 \(Fed. Cir. 2007\).](#)

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[\[FN13\] Rhodes v. Merit Systems Protection Bd., 487 F.3d 1377 \(Fed. Cir. 2007\).](#)

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## § 220. Grounds

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 65, 69.12, 71

### A.L.R. Library

[Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers, 15 A.L.R.4th 1207](#)

[First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9 § 3\[a\]](#)

When a statute provides for a public officer to hold office for a definite term, he or she can be suspended only for cause.[FN1] Furthermore, when a statute specifies certain grounds as constituting cause for suspension, and provides for suspension by a particular method, the enumerated grounds are the exclusive grounds that can constitute cause.[FN2] Suspension of a public officer or employee may be based on neglect of duty[FN3] or misconduct.[FN4] Where the conduct of a public employee that forms the basis of disciplinary proceedings resulting in the employee's suspension may also constitute a violation of criminal law, the absence of a conviction does not bar a finding of guilt for misconduct in office in the disciplinary proceeding.[FN5]

It has been held that a suspension may also be based on the employee's or officer's refusal to take a polygraph examination, under certain circumstances.[FN6] Suspension on this ground is improper, however, where the officer did not actually refuse to take the examination[FN7] or where the officer, a witness in a criminal trial, is the subject of a trial judge's order directing him or her to make no statement concerning such trial.[FN8]

To allow a governmental unit to suspend a public employee without pay for exercising his or her right to speak on matters of public concern would have the same inhibiting effect on the exercise of freedom of speech

as the discharging of such employee.[FN9] Thus, numerous cases have examined whether suspensions of public officers or employees based on their statements or other communications were constitutionally permissible under the First Amendment.[FN10]

Under some employment rules, offenses may be "pyramided" to form the basis for suspension of an employee.[FN11]

Under federal statute, the head of a federal agency may suspend without pay an employee of his or her agency when he or she considers that action necessary in the interests of national security.[FN12]

**Observation:** Suspensions in the interest of national security may not be grieved in a negotiated grievance process.[FN13]

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[FN1] Macaluso v. West, 40 Ill. App. 3d 392, 352 N.E.2d 382 (5th Dist. 1976).

- As to grounds for suspension of civil service employees, see Am. Jur. 2d, Civil Service §§ 63 et seq.

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[FN2] Macaluso v. West, 40 Ill. App. 3d 392, 352 N.E.2d 382 (5th Dist. 1976).

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[FN3] Bass v. Askew, 342 So. 2d 145 (Fla. Dist. Ct. App. 1st Dist. 1977).

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[FN4] Williams v. Veterans Admin., 701 F.2d 764 (8th Cir. 1983).

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[FN5] Sabia v. City of Elizabeth, 132 N.J. Super. 6, 331 A.2d 620 (App. Div. 1974).

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[FN6] Frey v. Department of Police, 288 So. 2d 410 (La. Ct. App. 4th Cir. 1973).

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[FN7] Jackson v. Wilson, 152 Ga. App. 250, 262 S.E.2d 547 (1979).

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[FN8] People ex rel. Rothmund v. Conlisk, 34 Ill. App. 3d 76, 339 N.E.2d 290 (1st Dist. 1975).

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[FN9] Larson v. Ruskowitz, 252 Kan. 963, 850 P.2d 253 (1993); Riddle v. City of Ottawa, 12 Kan. App. 2d 714, 754 P.2d 465 (1988).

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[FN10] Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988); Boals v. Gray, 775 F.2d 686 (6th Cir. 1985); Kadzielawski v. Board of Fire and Police Com'rs of the Village of Skokie, 194 Ill. App. 3d 676, 141 Ill. Dec. 338, 551 N.E.2d 331 (1st Dist. 1990); Sims v. Baer, 732 S.W.2d 916 (Mo. Ct. App. E.D. 1987).

- As to discharge or removal of an officer or employee for the exercise of constitutionally protected rights of free speech, see §§ 197 to 199.

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[FN11] Appeal of Batchelder, 122 N.H. 362, 444 A.2d 562 (1982).

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[FN12] 5 U.S.C.A. § 7532(a).

- As to notification of suspension required under such statute, and the right of the employee to submit statements or affidavits as to why he or she should be restored, see § 452.

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[FN13] Am. Jur. 2d, Labor and Labor Relations § 458.

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## § 221. Grounds—Financial and economic considerations

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [65](#), [69.12](#), [71](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 60](#) (Petition or application—For writ of mandamus—To compel reinstatement of discharged employees—Abolition of positions falsely ascribed to reasons of economy)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 64](#) (Answer—Defense—Municipal employee suspended as economy measure)

A temporary layoff is not improper where the state is experiencing a severe financial crisis.[FN1] Lack of funds induced when projected income falls below anticipated expenses is a legitimate basis for laying off public employees, so long as such layoffs are made in conformity with law.[FN2]

**Observation:** The issue of good faith by a governmental subdivision in abolishing a position as an economy measure presents a question of an abuse of discretion by the governing board of such subdivision which is a question of law for the court.[FN3]

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[FN1] [Crider v. State, 110 Mich. App. 702, 313 N.W.2d 367 \(1981\).](#)

- As to the suspension of municipal employees as an economy measure, see [Am. Jur. 2d, Municipal](#)

[Corporations, Counties, and Other Political Subdivisions § 268.](#)

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[FN2] [Gannon v. Perk, 46 Ohio St. 2d 301, 75 Ohio Op. 2d 358, 348 N.E.2d 342 \(1976\).](#)

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[FN3] [Moncrief v. Tate, 593 S.W.2d 312 \(Tex. 1980\).](#)

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VIII. Termination, Suspension, or Other Adverse Action As to Office or Employment  
J. Other Disciplinary Measures or Adverse Actions; Failure to Reappoint

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## **§ 222. Measures or actions based on speech, generally**

### **West's Key Number Digest**

West's Key Number Digest, [Constitutional Law](#) 1927  
West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

### **A.L.R. Library**

[First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9 § 11\[a\]](#)

[First Amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 A.L.R. Fed. 396](#)

Discipline of public employees is subject to the same requirements generally applicable to discharge where such action is based on the employees' exercise of protected First Amendment free speech rights.[FN1] Further, the fact that public officers were terminated by a "failure to rehire" rather than a "dismissal" has been said to be irrelevant to the question whether they were impermissibly terminated for exercising their First Amendment rights.[FN2] An "adverse employment action," for purpose of a public employee's First Amendment retaliation claim, is exhibited by a material employment disadvantage, such as a change in salary, benefits, or responsibilities.[FN3]

In determining whether a public employee's speech is entitled to constitutional protection, the fact that the employee expresses his or her views inside his or her office, rather than publicly, is not dispositive, as employees in some cases may receive First Amendment protection for expressions made at work.[FN4] In determining whether a public employee's speech is entitled to constitutional protection, the fact that the speech

concerns the subject matter of the employee's employment is nondispositive; the First Amendment protects some expressions related to the speaker's job.[\[FN5\]](#) However, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[\[FN6\]](#)

**Observation:** So long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.[\[FN7\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Reassignment to another position or banishment from employment functions is sufficient to show an adverse employment action in asserting a First Amendment retaliation claim. [U.S.C.A. Const.Amend. 1. D'Andrea v. University of Hawaii, 686 F. Supp. 2d 1079 \(D. Haw. 2010\).](#)

### [END OF SUPPLEMENT]

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[\[FN1\] Fire Fighters Ass'n, District of Columbia v. Barry, 742 F. Supp. 1182 \(D.D.C. 1990\).](#)

- As to discharge or removal of public officers or employees based on speech, generally, see §§ [197](#) to [199](#).

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[\[FN2\] McBee v. Jim Hogg County, Tex., 730 F.2d 1009 \(5th Cir. 1984\).](#)

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[\[FN3\] Meyers v. Starke, 420 F.3d 738 \(8th Cir. 2005\).](#)

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[\[FN4\] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

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[\[FN5\] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

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[\[FN6\] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

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[\[FN7\] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

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**§ 223. Measures or actions based on political affiliation, beliefs, or activities**

**West's Key Number Digest**

West's Key Number Digest, [Constitutional Law](#) 1475(5)

West's Key Number Digest, [Officers and Public Employees](#) 66, 69.7

**A.L.R. Library**

[Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment, 70 A.L.R. Fed. 371](#)

The general rule that a public employee may not be dismissed from his or her employment on the grounds of his or her political affiliation[[FN1](#)] is applicable to situations involving adverse job action short of discharge.[[FN2](#)] Thus, a public employee may not be demoted or disciplined for political activities or beliefs, unless political affiliation or belief is an appropriate job qualification for the particular position.[[FN3](#)] The argument that the principles relating to patronage dismissals of public employees do not apply to situations involving a failure to reappoint, has been rejected, it being said that even an employee who has no legitimate expectation of continued employment may not be replaced solely for partisan political reasons.[[FN4](#)]

In a number of cases, courts, without discussion, have applied the rules relating to the propriety of dismissing a public employee for political patronage reasons to cases involving the failure to reappoint, demotion, or transfer of public employees on the basis of their political beliefs.[[FN5](#)]

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[[FN1](#)] § 188.

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[[FN2](#)] [Rutan v. Republican Party of Illinois](#), 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

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[[FN3](#)] [O'Connor v. Steeves](#), 994 F.2d 905 (1st Cir. 1993).

- As to political affiliation as affecting eligibility or qualification for a federal office or position, generally, see [§ 79](#).

- As to political activities, beliefs, or affiliation, as grounds for discharge or removal of a public officer or employee, see [§ 188](#).

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[[FN4](#)] [Brady v. Paterson](#), 515 F. Supp. 695 (N.D. N.Y. 1981), dismissed, [671 F.2d 491](#) (2d Cir. 1981).

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[\[FN5\] Aufiero v. Clarke, 639 F.2d 49 \(1st Cir. 1981\)](#) (demotion); [Johnson v. Bergland, 586 F.2d 993 \(4th Cir. 1978\)](#) (transfer); [Bueno v. City of Donna, 714 F.2d 484 \(5th Cir. 1983\)](#) (forced resignation); [Barrett v. Thomas, 649 F.2d 1193 \(5th Cir. 1981\)](#) (demotion); [Tanner v. McCall, 625 F.2d 1183 \(5th Cir. 1980\)](#) (failure to reappoint); [Whited v. Fields, 581 F. Supp. 1444 \(W.D. Va. 1984\)](#) (failure to rehire); [Miller v. Board of Educ. of Lincoln County, 450 F. Supp. 106 \(S.D. W. Va. 1978\)](#) (transfer and demotion); [Longley v. State Employees Appeals Bd., 392 A.2d 529 \(Me. 1978\)](#) (failure to reappoint).

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## Research References

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## Forms



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## **§ 224. Generally; constitutional, statutory, or regulatory basis**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

Implied in every public office is an authority to exercise some portion of the sovereign power of the state in making, executing, or administering the law.[FN1] The duties of an office are prescribed by the constitution or by statute and necessarily inure in and pertain to the administration of the office itself.[FN2] A public servant is authorized by law to perform particular acts if there is a legislative enactment, a legally adopted administrative rule or regulation, or a judicial pronouncement which defines his or her duties, and a county official is authorized to perform any other acts necessary to carry out these express responsibilities.[FN3]

Where the legislature has enumerated the powers incident to any given office, and the constitution is silent as to the duties of that office, the legislature's enactment is final and supersedes any residual authority that office may have had at common law.[FN4] Where an office is created by the constitution, the legislature may not frustrate the purpose in the creation of such office by taking away all the duties of the officer involved.[FN5] On the other hand, the legislative power to fasten duties upon an office, in addition to the duties prescribed by the Constitution, is not limited by implication, because the express mentioning in, and conferring by, a constitutional provision of named powers and duties, without a further provision confining them to those expressly so named, does not create an inhibition upon the legislature from prescribing and annexing other duties appertaining to the same department of government.[FN6]

[\[FN1\] Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 \(1926\); Smith v. Jansen, 85 Misc. 2d 81, 379 N.Y.S.2d 254 \(Sup 1975\); State v. Hord, 264 N.C. 149, 141 S.E.2d 241 \(1965\).](#)

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[\[FN2\] Larson v. State, 564 P.2d 365 \(Alaska 1977\).](#)

- As to officers and members of administrative agencies, generally, see [Am. Jur. 2d, Administrative Law §§ 34 et seq.](#)

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[\[FN3\] People v. Buckallew, 848 P.2d 904 \(Colo. 1993\).](#)

- As to particular powers and duties of public officers and employees, see [§§ 241 et seq.](#)

- As to rights, powers, and duties of municipal and county employees, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 241 et seq.](#)

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[\[FN4\] Mounts v. State, 496 N.E.2d 37 \(Ind. 1986\).](#)

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[\[FN5\] Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362 \(1953\).](#)

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[\[FN6\] Rouse v. Johnson, 234 Ky. 473, 28 S.W.2d 745, 70 A.L.R. 1077 \(1930\).](#)

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**§ 225. Limitations on authority; extent of powers and duties**

**West's Key Number Digest**

Public officers may exercise only that power which is conferred upon them by law.[\[FN1\]](#) The powers and duties of public office are measured by the terms and necessary implication of the grant of constitutional or statutory authority;[\[FN2\]](#) in this regard, it has sometimes been stated that public officers have only those powers expressly granted[\[FN3\]](#) or necessarily implied[\[FN4\]](#) by statute, and that any act of an officer, to be valid, must find express authority in the law[\[FN5\]](#) or be necessarily incidental to a power expressly granted.[\[FN6\]](#)

Public officers' powers and duties must be executed in the manner directed,[\[FN7\]](#) and by the officer specified,[\[FN8\]](#) by the applicable provisions granting such powers and duties. If broader powers are desirable, they must be conferred by the proper authority.[\[FN9\]](#)

Government officials may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity.[\[FN10\]](#) Neither may officials ignore clear constitutional rules and hide behind the advice of an attorney; officials are required to act reasonably, and the law expects its officials to behave responsibly.[\[FN11\]](#)

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[\[FN1\]](#) [Churchill v. S. A. D. No. 49 Teachers Ass'n, 380 A.2d 186 \(Me. 1977\).](#)

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[\[FN2\]](#) [California State Restaurant Assn. v. Whitlow, 58 Cal. App. 3d 340, 129 Cal. Rptr. 824 \(1st Dist. 1976\); Howell School Bd. Dist. No. 9, Wyacondah Tp., Davis County v. Hubbartt, 246 Iowa 1265, 70 N.W.2d 531 \(1955\).](#)

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[\[FN3\]](#) [Hoppe v. King County, 95 Wash. 2d 332, 622 P.2d 845 \(1980\).](#)

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[\[FN4\]](#) [§ 226.](#)

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[\[FN5\]](#) [Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 \(5th Dist. 1992\), opinion modified, \(Apr. 6, 1992\).](#)

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[\[FN6\]](#) [§ 226.](#)

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[\[FN7\]](#) [Rogers v. County Com'rs of New Haven County, 141 Conn. 426, 106 A.2d 757 \(1954\); Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137 \(1951\).](#)

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[\[FN8\]](#) [Roper v. Winner, 244 S.W.2d 355 \(Tex. Civ. App. San Antonio 1951\); Vermont Acc. Ins. Co. v. Burns, 114 Vt. 143, 40 A.2d 707 \(1944\).](#)

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[\[FN9\]](#) [Vermont Acc. Ins. Co. v. Burns, 114 Vt. 143, 40 A.2d 707 \(1944\).](#)

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[\[FN10\]](#) [Duran v. City of Douglas, Ariz., 904 F.2d 1372 \(9th Cir. 1990\).](#)

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[\[FN11\]](#) [Los Angeles Police Protective League v. Gates, 907 F.2d 879 \(9th Cir. 1990\).](#)

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**§ 226. Limitations on authority; extent of powers and duties—Implied powers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

Public officers have only those powers expressly granted[[FN1](#)] or necessarily implied[[FN2](#)] by statute, and any act of an officer to be valid must find express authority in the law[[FN3](#)] or be necessarily incidental to a power expressly granted.[[FN4](#)] In this regard, while the courts will go to all reasonable lengths in interpreting statutes conferring powers on officers of the state in order that laws may be given effect and the ends of justice served, they cannot, by construction, confer on any officer an authority that the legislature has seen fit to withhold.[[FN5](#)]

However, every specific or permissible act of a public officer need not be expressed in a statute; the authority to do those acts necessary to achieve the power or object expressly granted is implied, because the legislature must have intended to grant the constituent details within the larger commission.[[FN6](#)] The duties of a public office include all those which fairly lie within its scope,[[FN7](#)] and those which are essential to the accomplishment of the main purposes for which the office was created.[[FN8](#)]

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[[FN1](#)] § 225.

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[[FN2](#)] [Hoppe v. King County](#), 95 Wash. 2d 332, 622 P.2d 845 (1980).

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[[FN3](#)] § 225.

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[\[FN4\] \*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.\*, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 \(5th Dist. 1992\)](#), opinion modified, (Apr. 6, 1992).

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[\[FN5\] \*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.\*, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 \(5th Dist. 1992\)](#), opinion modified, (Apr. 6, 1992).

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[\[FN6\] \*Bullock v. Calvert\*, 480 S.W.2d 367 \(Tex. 1972\)](#).

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[\[FN7\] \*State ex rel. Dison v. Hanson\*, 248 Minn. 87, 78 N.W.2d 679 \(1956\)](#).

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[\[FN8\] \*White v. Towers\*, 37 Cal. 2d 727, 235 P.2d 209, 28 A.L.R.2d 636 \(1951\)](#).

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## **§ 227. Powers of deputies**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

Deputies are usually invested with all the power and authority of the principal,[\[FN1\]](#) and this is one of the tests for determining whether persons employed in a public office to perform only clerical duties, which constitute only a part of the officer's official duties, are mere clerks and employees or are deputies.[\[FN2\]](#)

Generally, a deputy must sign or act in the name of his or her principal, since where the authority exercised by the deputy is a derivative and subsidiary one, it is the authority conferred on the principal and not an authority inherent in the deputy.[\[FN3\]](#)

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[\[FN1\] Sanchez v. Murphy, 385 F. Supp. 1362 \(D. Nev. 1974\); Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 \(1976\).](#)

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[\[FN2\] State ex rel. Emmons v. Guckenberger, 131 Ohio St. 466, 6 Ohio Op. 148, 3 N.E.2d 502 \(1936\).](#)

- For discussion of deputy clerks, generally, see [Am. Jur. 2d, Clerks of Court §§ 40 et seq.](#)

- As to deputy sheriffs, generally, see [Am. Jur. 2d, Sheriffs, Police, and Constables § 32.](#)

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[\[FN3\] Sanchez v. Murphy, 385 F. Supp. 1362 \(D. Nev. 1974\); Roberts v. State ex rel. Jackson County Bd. of Com'rs, 151 Ind. App. 83, 278 N.E.2d 285 \(1972\).](#)

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2. General Characterization of Powers and Duties; Ministerial or Discretionary Nature

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**§ 228. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [91](#), [92](#)

The powers and duties of public officers are generally classified as ministerial or discretionary. From the standpoint of an officer's obligation to perform, his or her duties are denominated as mandatory or permissive.[FN1]

In the context of determining whether a duty may be enforced by mandamus, it has been said that the character of a duty as ministerial or discretionary must be determined by the nature of the act to be performed, and not by the office of the performer.[FN2] A similar rule is applied in determining whether a function is judicial, quasi-judicial, or ministerial.[FN3] The duties are often blended in one officer. Thus, a judicial officer may act in a ministerial capacity, or a ministerial officer may exercise discretionary or judicial functions.[FN4] Classifying a person's acts as discretionary or ministerial is often difficult,[FN5] and the decision whether acts of a public official are ministerial or discretionary is determined by the facts of the particular case.[FN6]

Where the law prescribes and defines an official's duty with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the performance of that duty is a ministerial act.[FN7] Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts;[FN8] that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature.[FN9] Where the officer or official body has no judicial power or discretion as to the interpretation of the law, and the course to be pursued is fixed by law, their acts are ministerial only.[FN10]

Where the act to be done involves the exercise of discretion or judgment, performance of that duty is not merely ministerial.[FN11] Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.[FN12] When a law does not specify the precise action an official must take, that official retains discretionary authority.[FN13]

The key distinction, then, between these types of acts is whether the duty is mandatory or whether the act complained of involved policymaking or judgment,[FN14] as a discretionary duty involves judgment, planning, or policy decisions.[FN15] An act is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required.[FN16]

## CUMULATIVE SUPPLEMENT

### Cases:

The determination as to whether an official's action is discretionary, in which case official immunity does apply, or ministerial, in which case it does not, depends on the character of the specific actions complained of, not the general nature of the job. [Kennedy v. Mathis, 297 Ga. App. 295, 676 S.E.2d 746 \(2009\)](#), cert. denied, (June 29, 2009).

Whether an official's acts upon which liability is predicated are ministerial, in which case official immunity does not apply, or discretionary, in which case official immunity does apply, is determined by the facts of the particular case. [Kennedy v. Mathis, 297 Ga. App. 295, 676 S.E.2d 746 \(2009\)](#), cert. denied, (June 29, 2009).

### [END OF SUPPLEMENT]

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[FN1] [State ex rel. School Dist. of Scottsbluff v. Ellis, 163 Neb. 86, 77 N.W.2d 809 \(1956\)](#); [State v. Herrman, 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 \(2d Dist. Montgomery County 1961\)](#).

- As to a discussion of the question whether an officer exercises ministerial or discretionary powers in suits to compel him or her to take some official action or to prevent him or her from acting, see [Am. Jur. 2d, Injunctions §§ 159 to 162](#); [Am. Jur. 2d, Mandamus §§ 49 et seq.](#)

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[FN2] [Am. Jur. 2d, Mandamus § 49.](#)

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[\[FN3\] State v. Herrman, 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 \(2d Dist. Montgomery County 1961\); Ex parte Anderson, 191 Or. 409, 229 P.2d 633, 29 A.L.R.2d 1051 \(1951\).](#)

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[\[FN4\] State v. Herrman, 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 \(2d Dist. Montgomery County 1961\); Mannix v. Portland Telegram, 144 Or. 172, 23 P.2d 138, 90 A.L.R. 55 \(1933\).](#)

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[\[FN5\] Larson v. Independent School Dist. No. 314, Braham, 289 N.W.2d 112 \(Minn. 1979\).](#)

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[\[FN6\] Nelson v. Spalding County, 249 Ga. 334, 290 S.E.2d 915 \(1982\).](#)

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[\[FN7\] City of Bothell v. Gutschmidt, 78 Wash. App. 654, 898 P.2d 864 \(Div. 1 1995\).](#)

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[\[FN8\] Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 \(1990\); Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\).](#)

- As to the effect of a duty being ministerial or discretionary upon the liability of an officer or employee, see §§ 318, 320.

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[\[FN9\] Clinton County Farm Bureau v. Clinton County Fiscal Court, 339 S.W.2d 930 \(Ky. 1960\); State v. Herrman, 115 Ohio App. 271, 20 Ohio Op. 2d 353, 184 N.E.2d 921 \(2d Dist. Montgomery County 1961\).](#)

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[\[FN10\] School Dist. of Minatare in Scotts Bluff County v. Scotts Bluff County, 189 Neb. 395, 202 N.W.2d 825 \(1972\).](#)

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[\[FN11\] City of Bothell v. Gutschmidt, 78 Wash. App. 654, 898 P.2d 864 \(Div. 1 1995\).](#)

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[\[FN12\] Upchurch v. Clinton County, 330 S.W.2d 428 \(Ky. 1959\); Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 \(1973\).](#)

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[\[FN13\] Deckert v. Lang, 774 P.2d 1285 \(Wyo. 1989\).](#)

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[\[FN14\] Jackson v. Kelly, 557 F.2d 735 \(10th Cir. 1977\).](#)

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[\[FN15\] Davis v. Knud-Hansen Memorial Hospital, 635 F.2d 179 \(3d Cir. 1980\); Jackson v. Kelly, 557 F.2d 735 \(10th Cir. 1977\).](#)

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[\[FN16\] Jackson v. Kelly, 557 F.2d 735 \(10th Cir. 1977\).](#)

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IX. Powers, Duties, and Rights, in General

A. In General

2. General Characterization of Powers and Duties; Ministerial or Discretionary Nature

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**§ 229. Delegation of discretionary authority; exercise or control by other than officer with authority**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

When the legislature has made clear its intent that one public official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.[FN1] Consequently, discretionary powers may not be delegated,[FN2] at least not without statutory authority to do so;[FN3] such powers are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.[FN4] However, this rule should not be applied when the legislature provides statutory authorization for the delegation of such powers.[FN5]

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[FN1] [Bagley v. City of Manhattan Beach](#), 18 Cal. 3d 22, 132 Cal. Rptr. 668, 553 P.2d 1140 (1976).

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[FN2] [Nelms v. Civil Service Commission](#), 300 Minn. 319, 220 N.W.2d 300 (1974).

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[FN3] [Steele v. Gray](#), 64 Wis. 2d 422, 219 N.W.2d 312 (1974), opinion modified on other grounds, [64 Wis. 2d 422](#), 223 N.W.2d 614 (1974).

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[FN4] [California Sch. Employees Assn. v. Personnel Commission](#), 3 Cal. 3d 139, 89 Cal. Rptr. 620, 474 P.2d 436 (1970).

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[FN5] [Nelms v. Civil Service Commission](#), 300 Minn. 319, 220 N.W.2d 300 (1974).

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## § 230. Construction of discretionary powers

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

Generally speaking, the mere authorization to perform an act does not impose a mandatory duty upon a public official; if a statute is permissive, there is no clear mandatory duty to perform the function enumerated by the statute.[FN1] Thus, for example, where statutory provisions defining the time and mode in which public officers will discharge their duties are obviously designed merely to secure order, uniformity, system, and dispatch in public business, they are generally deemed to be directory.[FN2]

An officer may be vested with discretion in respect to the manner in which he or she may exercise a power, and yet there may rest on him or her a mandatory duty to perform the power.[FN3] Powers conferred on public officers have been construed as mandatory, although the language may be permissive, where they are for the benefit of the public or individuals;[FN4] or, as sometimes stated, when the directory word "may" is used in conferring power upon a public officer, and the public or third persons have an interest in the exercise of the power, then the exercise of the power is usually deemed imperative.[FN5]

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[FN1] [Platz v. Hamilton](#), 201 Mont. 184, 653 P.2d 144 (1982).

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[FN2] [Benedictine Sisters Benev. Ass'n v. Pettersen](#), 299 N.W.2d 738 (Minn. 1980).

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[FN3] [Fuller v. State](#), 31 Ala. App. 324, 16 So. 2d 428 (1944); [State ex rel. Merrill v. Greenbaum](#), 83 Ohio App. 484, 38 Ohio Op. 537, 84 N.E.2d 253 (9th Dist. Summit County 1948).

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[FN4] [Brooke v. Moore](#), 60 Ariz. 551, 142 P.2d 211 (1943).

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[\[FN5\] Syverson, Rath and Mehrer, P.C. v. Peterson, 495 N.W.2d 79 \(N.D. 1993\).](#)

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**§ 231. Nature and effect, generally**

**West's Key Number Digest**

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**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 3](#) (Complaint, petition, or declaration—  
Allegation—Official capacity of plaintiff)

When power or jurisdiction is delegated to any public officer over a subject matter, and its exercise is confided to his or her discretion, the acts done in the exercise of the authority are, in general, binding and valid as to the subject matter.[\[FN1\]](#) The only questions which can arise between an individual and the public, or any person denying the validity of the officer's acts, are the power in the officer and fraud in the party.[\[FN2\]](#)

An officer can, however, with some exceptions,[\[FN3\]](#) generally bind his or her government only by acts which come within the just exercise of his or her official powers and within the scope of his or her authority.[\[FN4\]](#)

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[FN1] [Permann v. Knife River Coal Min. Co., 180 N.W.2d 146 \(N.D. 1970\)](#) (overruled on other grounds by, [Haag v. State Bd. of University and School Lands, 219 N.W.2d 121 \(N.D. 1974\)](#)) and (overruled in part on other grounds by, [Manikowske v. North Dakota Workmen's Compensation Bureau, 338 N.W.2d 823 \(N.D. 1983\)](#)).

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[FN2] [Permann v. Knife River Coal Min. Co., 180 N.W.2d 146 \(N.D. 1970\)](#) (overruled on other grounds by, [Haag v. State Bd. of University and School Lands, 219 N.W.2d 121 \(N.D. 1974\)](#)) and (overruled in part on other grounds by, [Manikowske v. North Dakota Workmen's Compensation Bureau, 338 N.W.2d 823 \(N.D. 1983\)](#)).

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[FN3] [§ 233](#).

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[FN4] [Sanchez v. Board of County Com'rs of Valencia County, 81 N.M. 644, 471 P.2d 678 \(Ct. App. 1970\)](#).

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**§ 232. Time of performance; reasonableness**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [91](#), [92](#)

Where a statute is silent with respect to the time within which an official act must be performed, the law contemplates that the duty must be performed within a reasonable time.[FN1] A public official who undertakes

to perform an act, even an act which is completely discretionary, must do so reasonably and in complete good faith, without such delay as would frustrate its ultimate objective.[FN2]

In the absence of language forbidding a public officer from performing an act at other than the time stated in a statute, the time period expressed is to be construed as directory and not mandatory,[FN3] unless the nature of the act to be performed or the language used in the statute evidences an intention to limit the power of the officer.[FN4]

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[FN1] [Brink v. Curless, 209 N.W.2d 758 \(N.D. 1973\)](#) (overruled on other grounds by, [City of Bismarck v. Muhlhauser, 234 N.W.2d 1 \(N.D. 1975\)](#)).

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[FN2] [Moore v. D'Ambrose, 57 A.D.2d 394, 394 N.Y.S.2d 662 \(1st Dep't 1977\)](#), order rev'd on other grounds, [46 N.Y.2d 816, 414 N.Y.S.2d 121, 386 N.E.2d 1088 \(1978\)](#).

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[FN3] [Ellis Hospital v. Axelrod, 105 Misc. 2d 101, 431 N.Y.S.2d 804 \(Sup 1980\)](#).

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[FN4] [Foley v. Civil Service Commission, 89 Ill. App. 3d 871, 45 Ill. Dec. 261, 412 N.E.2d 612 \(1st Dist. 1980\)](#).

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**§ 233. Acts unauthorized or outside scope of authority; effect of apparent authority**

**West's Key Number Digest**

The rule that an agent can bind his or her principal by acts within apparent authority[[FN1](#)] has been held not to apply to public officers.[[FN2](#)] Federal instrumentalities cannot be estopped or bound by unauthorized acts of their agents.[[FN3](#)] Furthermore, as a general rule, the government is not bound by the action of its officers where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made.[[FN4](#)]

However, there is some authority for the view that an officer can bind his or her government by acts not within the just exercise of his or her official powers and within the scope of his or her authority, where the government held out the officer as having authority to perform the acts.[[FN5](#)]

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[[FN1](#)] [Am. Jur. 2d, Agency § 262.](#)

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[[FN2](#)] [Thermo Products Co. v. Chilton Independent School Dist., 647 S.W.2d 726, 10 Ed. Law Rep. 447 \(Tex. App. Waco 1983\), writ refused n.r.e., \(June 1, 1983\).](#)

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[[FN3](#)] [Paslowski v. Standard Mortg. Corp. of Georgia, 129 F. Supp. 2d 793 \(W.D. Pa. 2000\).](#)

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[[FN4](#)] [Perry v. Barker, 169 W. Va. 531, 289 S.E.2d 423 \(1982\).](#)

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[[FN5](#)] [Sanchez v. Board of County Com'rs of Valencia County, 81 N.M. 644, 471 P.2d 678 \(Ct. App. 1970\).](#)

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#### § 234. Judicial review

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Where a statute gives a discretionary power to an officer to be exercised by him or her upon his or her own opinion of certain facts, he or she is the sole and exclusive judge of the existence of those facts.<sup>[FN1]</sup> The courts generally will not attempt to interfere with or control the exercise of an officer's discretionary powers,<sup>[FN2]</sup> in the absence of any controlling provisions in the law conferring the power.<sup>[FN3]</sup> The fact that the exercise of a power may be abused is not a sufficient reason for denying its existence.<sup>[FN4]</sup> Although courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of the acts of public officers, after the matter has once passed beyond their control, they have no power to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him or her for action.<sup>[FN5]</sup> Even where a court, in the exercise of its jurisdiction, reviews the discretionary act of a public officer, the decision of the officer will not be disturbed in the absence of a showing of an abuse of discretion or an arbitrary decision,<sup>[FN6]</sup> or such fraud or corruption as vitiates the action taken.<sup>[FN7]</sup>

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[FN1] [U.S. v. George S. Bush & Co., Inc.](#), 310 U.S. 371, 60 S. Ct. 944, 84 L. Ed. 1259 (1940); [State ex rel. Dison v. Hanson](#), 248 Minn. 87, 78 N.W.2d 679 (1956).

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[FN2] [People ex rel. Woll v. Graber](#), 394 Ill. 362, 68 N.E.2d 750 (1946); [LaFleur v. Roberts](#), 157 So. 2d 340 (La. Ct. App. 3d Cir. 1963); [Leeman v. Vocolka](#), 149 Neb. 702, 32 N.W.2d 274 (1948).

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[FN3] [Leeman v. Vocolka](#), 149 Neb. 702, 32 N.W.2d 274 (1948).

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[FN4] [Leeman v. Vocolka](#), 149 Neb. 702, 32 N.W.2d 274 (1948).

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[FN5] [Leeman v. Vocolka](#), 149 Neb. 702, 32 N.W.2d 274 (1948).

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[FN6] [Standard Printing Co. v. Miller](#), 304 Ky. 49, 199 S.W.2d 731 (1946); [LaFleur v. Roberts](#), 157 So. 2d 340 (La. Ct. App. 3d Cir. 1963).

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[FN7] [Standard Printing Co. v. Miller](#), 304 Ky. 49, 199 S.W.2d 731 (1946).

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## **§ 235. Others' duties, notice, and knowledge of authority of public officers or employees**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [91](#), [92](#)

Every person is required to take notice of the extent of authority conferred by law on a person acting in an official capacity,[[FN1](#)] especially since there is no apparent authority in a public officer whose duties are prescribed by law as there would be in the case of an agent for a private party.[[FN2](#)] Persons contracting with the public officer acting under a public law must, at their peril, ascertain the scope of the officer's authority, and are chargeable with notice of the contents of the enactment conferring that authority.[[FN3](#)]

One who deals with a public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his or her peril to ascertain the extent of his or her powers to bind the government for which he or she is an officer.[[FN4](#)]

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[\[FN1\] Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 77 A.2d 255 \(Ch. Div. 1950\)](#), judgment modified on other grounds, [8 N.J. 433, 86 A.2d 201 \(1952\)](#); [Schull Const. Co. v. Board of Regents of Ed., 79 S.D. 487, 113 N.W.2d 663, 3 A.L.R.3d 857 \(1962\)](#).

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[\[FN2\] Baker v. Deschutes County, 10 Or. App. 236, 498 P.2d 803 \(1972\)](#).

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[\[FN3\] Baker v. Deschutes County, 10 Or. App. 236, 498 P.2d 803 \(1972\)](#).

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[\[FN4\] Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 \(5th Dist. 1992\)](#), opinion modified, (Apr. 6, 1992).

- As to acts done in furtherance of an officer's authority as binding the government, generally, see [§ 231](#).

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**§ 236. Generally; validity as to officer**

The rule that the acts of a de facto officer are as valid and effective as if he or she held office de jure is inapplicable where no third parties who have relied upon the actions of a de facto officer are involved.[\[FN1\]](#) Thus, the acts of a de facto officer as far as he or she herself or himself is concerned are void,[\[FN2\]](#) and a de facto officer cannot justify his or her acts as binding or valid in any suit to which he or she is a party.[\[FN3\]](#) However, there is authority for the view that where there is no question of personal interest—such as where the de facto officer is seeking to invoke the de facto doctrine on behalf of the public—the doctrine may be invoked by the officer whose act is in issue.[\[FN4\]](#)

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[\[FN1\] Sansone v. Clifford, 219 Conn. 217, 592 A.2d 931 \(1991\).](#)

- As to the validity of acts of de facto officers as to third persons and members of the public, see [§ 237](#).

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[\[FN2\] State Dental Council and Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 \(1974\).](#)

- For discussion of de facto officers, generally, see [§§ 23 et seq.](#)

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[\[FN3\] In re G. V., 136 Vt. 499, 394 A.2d 1126 \(1978\).](#)

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[\[FN4\] Equal Employment Opportunity Commission v. Sears, Roebuck & Co., 504 F. Supp. 241 \(N.D. Ill. 1980\), aff'd, 839 F.2d 302 \(7th Cir. 1988\)](#) (rejected on other grounds by, [E.E.O.C. v. General Telephone Co. of Northwest, Inc., 885 F.2d 575 \(9th Cir. 1989\)](#)).

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### § 237. Validity as to third persons or public

#### West's Key Number Digest

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In general, the acts of a de facto officer are valid as to third persons and the public,<sup>[FN1]</sup> and third persons are entitled to rely on the actions of de facto officers without the necessity of investigating their title.<sup>[FN2]</sup> Under the de facto officer doctrine, the acts of one who assumes official authority and exercises duties under color of a valid appointment or election are valid where the community acquiesces to his or her authority; the mere failure to comply with a technical requirement does not void the official's actions as to third parties and the public, the acts being valid in the interest of justice.<sup>[FN3]</sup> The acts of an officer de facto are as valid and effectual, while he or she is permitted to retain office, as though he or she were an officer by right,<sup>[FN4]</sup> and the acts of a de facto officer are binding and valid until the individual is ousted from his or her office by the judgment of a court in a direct proceeding to try his or her title to the office.<sup>[FN5]</sup> The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title, even though it is later discovered that the legality of that person's appointment or election to office is deficient;<sup>[FN6]</sup> such officer's authority may not be collaterally attacked or inquired into by third persons affected.<sup>[FN7]</sup> This principle has been codified in some states under statutes providing that the official acts of a person in possession of a public office and exercising the functions thereof are valid and binding as official acts with regard to all persons interested or affected thereby, regardless of whether the person is lawfully entitled to hold the office and whether the person is lawfully qualified.<sup>[FN8]</sup> However, the rule that any act of an officer de facto which is performed prior to his or her removal from office is valid ceases when the person who invokes protection for the act of a de facto officer knew when the act was done that it was not the act of a legal officer.<sup>[FN9]</sup> Furthermore, it has been noted that the doctrine has been applied in the absence of a showing of prejudice by the plaintiff.<sup>[FN10]</sup>

Under the "de facto officer doctrine," if the statutory provision under which a public officer is appointed is vulnerable to constitutional challenge, official actions taken by the public officer before the invalidity of his or her appointment has been finally adjudicated may not be overturned on that basis.<sup>[FN11]</sup>

**Practice Tip:** Courts should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for plaintiffs to bring their assumedly substantial constitutional claims and would render legal norms concerning appointment and eligibility to hold office unenforceable.<sup>[FN12]</sup> Thus, for example, actions brought by persons who were or had been government employees, alleging that the procedures used by officials in the reduction of force violated federal personnel regulations and congressional enactments, and that the individuals who were responsible for the reduction in force held office in violation of the Appointments Clause of the Constitution,<sup>[FN13]</sup> were not necessarily barred by the de facto officer doctrine, where the purpose of the doctrine could be served without

leaving the plaintiffs without a remedy.[FN14] The core purposes of the doctrine are served if a plaintiff challenging government action on the ground that the officials taking that action improperly hold office meets two requirements: first, the plaintiff must bring his or her action at or around the time that the challenged government action is taken; second, the plaintiff must show that the agency or department involved has had reasonable notice of all the circumstances of the claimed defect in the official's title to office. This does not require that the plaintiff perform any particular rituals before bringing suit, nor does it mandate that the agency's knowledge of the alleged defect must come from the plaintiff. It does, however, require that the agency or department involved actually knows of the claimed defect.[FN15] These two requirements adequately protect citizens' reliance on past government actions and the government's ability to take effective and final action.[FN16]

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[FN1] Vick v. City of Waco, 614 S.W.2d 861 (Tex. Civ. App. Waco 1981), writ refused n.r.e., (July 22, 1981); State ex rel. Hayden v. Wyoming County Correctional Officer Civil Service Com'n, 186 W. Va. 239, 412 S.E.2d 237 (1991); Walberg v. State, 73 Wis. 2d 448, 243 N.W.2d 190 (1976) (holding modified on other grounds by, State v. Smith, 131 Wis. 2d 220, 388 N.W.2d 601 (1986)).

- For discussion of de facto officers, generally, see §§ 23 et seq.
- As to the proper manner in which to try the right or title of a de facto officer, see § 428.
- As to the status of an officer appointed by de facto officers, see § 26.
- As to effect of selection of grand jury by de facto officer, see Am. Jur. 2d, Grand Jury § 12.
- As to the validity of the acts of a de facto judge, see Am. Jur. 2d, Judges § 235.

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[FN2] State v. Oren, 160 Vt. 245, 627 A.2d 337 (1993).

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[FN3] State v. Gambrell, 814 P.2d 1136 (Utah Ct. App. 1991).

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[FN4] Appleby v. Belden Corp., 22 Ark. App. 243, 738 S.W.2d 807 (1987).

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[FN5] Martindale v. Honey, 259 Ark. 416, 533 S.W.2d 198 (1976).

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[FN6] Ryder v. U.S., 515 U.S. 177, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995).

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[FN7] Appleby v. Belden Corp., 22 Ark. App. 243, 738 S.W.2d 807 (1987); Town of Stratford v. Council 15, Local 407, AFSCME, 3 Conn. App. 590, 490 A.2d 1021 (1985).

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[FN8] Comer v. City of Mobile, 337 So. 2d 742 (Ala. 1976); Raper v. State, 317 So. 2d 709 (Miss. 1975).

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[FN9] State ex rel. Tenney v. Board of Educ. of Webster County, 182 W. Va. 395, 387 S.E.2d 862, 58 Ed. Law Rep. 379 (1989).

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[\[FN10\] Malone v. McHugh, 797 F. Supp. 154 \(E.D. N.Y. 1991\), judgment aff'd, 968 F.2d 1480 \(2d Cir. 1992\).](#)

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[\[FN11\] Marine Forests Soc. v. California Coastal Com'n, 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 \(2005\).](#)

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[\[FN12\] Andrade v. Lauer, 729 F.2d 1475 \(D.C. Cir. 1984\).](#)

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[\[FN13\] U.S. Const. Art. II, § 2, cl. 2.](#)

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[\[FN14\] Andrade v. Lauer, 729 F.2d 1475 \(D.C. Cir. 1984\).](#)

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[\[FN15\] Andrade v. Lauer, 729 F.2d 1475 \(D.C. Cir. 1984\).](#)

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[\[FN16\] Andrade v. Lauer, 729 F.2d 1475 \(D.C. Cir. 1984\).](#)

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Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., Eric C. Surette, J.D., Barbara J. Van Arsdale, J.D.

IX. Powers, Duties, and Rights, in General

B. Rights of Public Officers and Employees

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## **§ 238. Generally**

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[Actions Brought Under 42 U.S.C.A. §§ 1981 to 1983 for Racial Discrimination—Supreme Court cases, 164 A.L.R. Fed. 483](#)

An individual, in assuming public employment, retains all the rights and protections otherwise afforded him or her by the United States Constitution, and one such right is that of the individual to be free from arbitrary and unreasonable conduct on the part of the government.<sup>[FN1]</sup> An elected official has no personal vested right to the performance of his or her duties, separate from the rights of the people who elected him or her.<sup>[FN2]</sup> Yet, under certain circumstances, public employment may give rise to certain obligations which are constitutionally protected, and to which due process guarantees adhere;<sup>[FN3]</sup> for example, promised compensation may create a contractual right which, once vested, cannot be eliminated without unconstitutionally impairing the contract obligation.<sup>[FN4]</sup>

Furthermore, a public employee's constitutional rights are not absolute,<sup>[FN5]</sup> and government employees may be subject to restrictions on the exercise of constitutional rights to an extent that would not be permissible if applied to private citizens,<sup>[FN6]</sup> since the state's interest in regulating the conduct of its employees as a class differs significantly from its interest in regulating such activities by the general public.<sup>[FN7]</sup> In this regard, the constitutional rights of a public employee can be restrained when their exercise interferes with the government-employer's functions;<sup>[FN8]</sup> the rights of public employees may be abridged in the interest of preventing conflicts with official duties or promoting some legitimate interest of the governmental employer.<sup>[FN9]</sup> In this regard, public employees have an expectation of privacy that is somewhat diminished from that of the general public.<sup>[FN10]</sup> Even so, any restrictions on a public employee's constitutional rights must be in furtherance of a significant governmental interest.<sup>[FN11]</sup>

To justify restrictions on the exercise of constitutional rights, the government must show: (1) that the restraints rationally relate to the enhancement of the public service; (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights; and (3) that no alternatives less subversive of constitutional rights are available.<sup>[FN12]</sup> Significant state interests which must be considered are: maintaining proper employer-employee relations; whether the person involved is in a direct working relationship with the person affected by the publications; the effect on efficiency and harmony; the need for loyalty and confidentiality; and the effect on discipline.<sup>[FN13]</sup>

Federal statutes known as the Hatch Act place restrictions on political activities by federal employees, and are applicable to the political activities of state and local government employees if their principal employment is in connection with an activity that is partially or fully financed by the Federal Government.<sup>[FN14]</sup> Furthermore, most states have legislation regulating the political activities of public employees.<sup>[FN15]</sup> Also, state statutes or constitutional provisions which provide that the holders of certain offices automatically resign their positions if they become candidates for any other elective office generally do not violate either the 14th or the First Amendments of the Federal Constitution.<sup>[FN16]</sup>

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<sup>[FN1]</sup> [Saunders v. Cahill, 359 F. Supp. 79 \(N.D. Ill. 1973\)](#); [Spanihel v. Turrentine, 339 F. Supp. 1074 \(S.D. Tex. 1972\)](#).

- As to the right to a hearing before termination, see [§§ 441 et seq.](#)

- As to ethics and financial disclosure laws as valid with regard to public officers' or employees' constitutional rights, see

[§ 251.](#)

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[\[FN2\] § 12.](#)

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[\[FN3\] Hinchliffe v. City of San Diego, 165 Cal. App. 3d 722, 211 Cal. Rptr. 560 \(4th Dist. 1985\).](#)

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[\[FN4\] § 265.](#)

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[\[FN5\] Unruh v. City Council, 78 Cal. App. 3d 18, 143 Cal. Rptr. 870 \(5th Dist. 1978\).](#)

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[\[FN6\] Galer v. Board of Regents of the University System, 239 Ga. 268, 236 S.E.2d 617 \(1977\).](#)

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[\[FN7\] Asher v. Lombardi, 877 S.W.2d 628 \(Mo. 1994\).](#)

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[\[FN8\] Zaretsky v. New York City Health and Hospitals Corp., 84 N.Y.2d 140, 615 N.Y.S.2d 341, 638 N.E.2d 986 \(1994\).](#)

- As to actions against federal officers or employees, in general, see [§§ 406 et seq.](#)

- As to actions for removal, suspension, or with regard to other disciplinary measures as to public officers and employees, see [§§ 439 et seq.](#)

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[\[FN9\] Puckett v. Miller, 821 S.W.2d 791 \(Ky. 1991\).](#)

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[\[FN10\] Lissner v. U.S. Customs Service, 241 F.3d 1220 \(9th Cir. 2001\); Rosario v. U.S., 538 F. Supp. 2d 480 \(D.P.R. 2008\).](#)

- As to drug testing of public officers and employees, see [§ 261.](#)

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[\[FN11\] Galer v. Board of Regents of the University System, 239 Ga. 268, 236 S.E.2d 617 \(1977\).](#)

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[\[FN12\] Bagley v. Washington Tp. Hospital Dist., 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 \(1966\).](#)

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[\[FN13\] Unruh v. City Council, 78 Cal. App. 3d 18, 143 Cal. Rptr. 870 \(5th Dist. 1978\).](#)

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[\[FN14\] Am. Jur. 2d, Elections § 460.](#)

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[\[FN15\] Am. Jur. 2d, Elections § 461.](#)

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[\[FN16\] Am. Jur. 2d, Elections § 259.](#)

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IX. Powers, Duties, and Rights, in General

B. Rights of Public Officers and Employees

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## **§ 239. First Amendment rights; speech and publications by officer or employee**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [91](#), [92](#)

The state's interest in regulating the conduct and speech of its employees as a class differs significantly from its interest in regulating such activities by the general public.<sup>[FN1]</sup> The government may impose restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.<sup>[FN2]</sup> Even so, a public employee is entitled to First Amendment protections which include the right, within limits, to criticize and to comment upon matters touching the public service in which the employee is engaged.<sup>[FN3]</sup> Public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern,<sup>[FN4]</sup> so long as the employee's speech does not unduly impede the government's interest as an employer in the efficient performance of the public service it delivers through its employees.<sup>[FN5]</sup> The greater the potential social, as distinct from purely private, significance of a public employee's speech, the less likely is the employer to be justified in seeking to suppress it.<sup>[FN6]</sup> In determining the validity, under the First Amendment, of restraint on job-related speech of public employees, the court must arrive at a balance between (1) the interests of the employee, as a citizen, in commenting upon matters of public concern and (2) the interest of the state, as an employer, in promoting the efficiency of public services that the state

performs through its employees.[\[FN7\]](#) When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices.[\[FN8\]](#) The government as employer has a special interest in regulating the speech of its employees, which must be weighed against the employees' interest in commenting on public issues.[\[FN9\]](#) Whether the restriction on speaking out is permissible depends upon a weighing of the ambient facts and circumstances surrounding each case, and the permutation of those facts and circumstances may on balance tip the scale one way or the other. One significant consideration is whether the employee's criticism is at a proper time and in an appropriate place and manner.[\[FN10\]](#)

The Central Intelligence Agency may act to protect the substantial government interest in protecting both the secrecy of information important to national security and in the appearance of confidentiality essential to the effective operation of the foreign intelligence service by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.[\[FN11\]](#) A former agent of the Central Intelligence Agency, who entered a trust relationship when he executed, as an express condition of his employment, an agreement promising that he would not publish any information or material relating to the Agency, its activities, or intelligence activities generally, either during or after the term of his employment without specific approval of the Agency, breaches his fiduciary obligation when he publishes a book about Agency activities on the basis of his experience as an agent without submitting the account to the Agency for prepublication review, regardless of whether his book actually contains classified information.[\[FN12\]](#)

First Amendment protections apply to state officials through the due process clause of the Fourteenth Amendment.[\[FN13\]](#)

On a First Amendment free speech claim against a public employer, when deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.[\[FN14\]](#)

The mere failure of a government employer to accommodate the religious needs of an employee, where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement, does not violate the First Amendment's Free Exercise Clause.[\[FN15\]](#)

## **CUMULATIVE SUPPLEMENT**

### **Cases:**

Question of whether a public employee's speech was made pursuant to his employment duties, and not as concerned private citizen, as would render speech not protected by First Amendment, is not whether speech was made during employee's work hours, or whether it concerned subject matter of his employment; rather, it is whether speech was made pursuant to employee's job duties, or in other words, whether it was "commissioned" by the employer.

[U.S.C.A. Const.Amend. 1. Wright v. City of Salisbury, Mo., 656 F. Supp. 2d 1013 \(E.D. Mo. 2009\).](#)

Speech can be "pursuant to" a public employee's official job duties, such that it does not constitute speech as a citizen for First Amendment purposes, even though it is not required by, or included in the employee's job description, or in response to a request by the employer. [U.S.C.A. Const.Amend. 1. Castro v. County of Nassau, 739 F. Supp. 2d 153 \(E.D. N.Y. 2010\).](#)

When a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job, such that the speech is not protected under the First Amendment. [U.S.C.A. Const.Amend. 1. Carter v. Incorporated Village of Ocean Beach, 693 F. Supp. 2d 203 \(E.D. N.Y. 2010\).](#)

Speech is pursuant to official duties, in § 1983 First Amendment retaliation proceedings, if it owes its existence to a public employee's professional responsibilities. [U.S.C.A. Const.Amend. 1](#); [42 U.S.C.A. § 1983](#). [Jackler v. Byrne](#), 708 F. Supp. 2d 319 (S.D. N.Y. 2010).

**[END OF SUPPLEMENT]**

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[FN1] [Asher v. Lombardi](#), 877 S.W.2d 628 (Mo. 1994).

- As to freedom of speech, generally, see [Am. Jur. 2d, Constitutional Law §§ 450 et seq.](#)

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[FN2] [Marinoff v. City College of New York](#), 357 F. Supp. 2d 672, 196 Ed. Law Rep. 237 (S.D. N.Y. 2005).

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[FN3] [Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois](#), 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); [Bagley v. Washington Tp. Hospital Dist.](#), 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966).

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[FN4] [Garcetti v. Ceballos](#), 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); [Wilcoxon v. Red Clay Consolidated School Dist. Bd. of Educ.](#), 437 F. Supp. 2d 235, 211 Ed. Law Rep. 264 (D. Del. 2006).

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[FN5] [O'Connor v. Steeves](#), 994 F.2d 905 (1st Cir. 1993); [Belyeu v. Coosa County Bd. of Educ.](#), 998 F.2d 925 (11th Cir. 1993).

- As to oath requirements concerning speech, see [§ 124](#).

- As to speech of public officers or employees as grounds for removal or discharge, see [§ 197](#).

- As to a discussion of speech of public officers or employees as grounds for other disciplinary measures or actions adverse to employment, generally, see [§ 222](#).

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[FN6] [Eberhardt v. O'Malley](#), 17 F.3d 1023 (7th Cir. 1994).

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[FN7] [U.S. v. National Treasury Employees Union](#), 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995); [McFall v. Bednar](#), 407 F.3d 1081 (10th Cir. 2005); [Marinoff v. City College of New York](#), 357 F. Supp. 2d 672, 196 Ed. Law Rep. 237 (S.D. N.Y. 2005); [Hinton v. Conner](#), 366 F. Supp. 2d 297, 24 A.L.R. Fed. 2d 669 (M.D. N.C. 2005).

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[FN8] [Connick v. Myers](#), 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

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[FN9] [U. S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO](#), 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973).

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[FN10] [Unruh v. City Council](#), 78 Cal. App. 3d 18, 143 Cal. Rptr. 870 (5th Dist. 1978).

- Off-duty activities of a police officer, who videotapes himself stripping off generic police uniform and engaging in sexual acts and who offers home-made videos for sale on online auction site, fall outside First Amendment protection

for speech unrelated to employment and having no effect on mission and purpose of employer, where although the officer's activities take place outside the workplace and purport to be about subjects not related to his employment, the police department can demonstrate legitimate and substantial interests of its own that were compromised by the officer's speech. [City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 \(2004\)](#).

- A municipal employer's interest in maintaining a relationship of trust between African-American community and police and fire departments outweighs the expressive interests of police and fire department employees while off-duty in deliberately donning "blackface" and parading through the streets in mocking stereotypes of African-Americans in the community they served, for the purpose of a civil rights claim of police and fire department employees under the First Amendment free speech clause; the free speech clause does not require a government employer to sit idly by while its employees insult those they are hired to serve and protect. [Locurto v. Giuliani, 447 F.3d 159 \(2d Cir. 2006\)](#).

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[\[FN11\] Snepp v. U.S., 444 U.S. 507, 100 S. Ct. 763, 62 L. Ed. 2d 704 \(1980\)](#).

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[\[FN12\] Snepp v. U.S., 444 U.S. 507, 100 S. Ct. 763, 62 L. Ed. 2d 704 \(1980\)](#).

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[\[FN13\] Wares v. VanBebber, 319 F. Supp. 2d 1237 \(D. Kan. 2004\)](#).

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[\[FN14\] Maldonado v. City of Altus, 433 F.3d 1294, 24 A.L.R. Fed. 2d 787 \(10th Cir. 2006\)](#).

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[\[FN15\] Shrum v. City of Coweta, Okla., 449 F.3d 1132 \(10th Cir. 2006\)](#).

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**§ 240. First Amendment rights; speech and publications by officer or employee—What is matter of "public concern"**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 91, 92

All public-employee speech that by content is within the general protection of the First Amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee—most typically, a private personnel grievance.<sup>[FN1]</sup> A public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.<sup>[FN2]</sup>

When a public employee challenges government-imposed restrictions on his or her speech, the court must first determine whether the speech at issue can be fairly characterized as constituting speech on a matter of public concern, which is defined as speech relating to any matter of political, social, or other concern to the community.<sup>[FN3]</sup> So long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.<sup>[FN4]</sup>

A municipality's implementation of an English-only policy does not violate the First Amendment free speech rights of Spanish-speaking Hispanic employees, since the mere act of speaking in Spanish does not constitute speech on a matter of public concern, the use of Spanish is not intended to communicate ethnic pride or opposition to discrimination, the speech precluded by the English-only rule did not include communications on matters of public concern, and the English-only rule is not intended to limit communications on matters of public concern.<sup>[FN5]</sup>

City fire department regulations requiring prior department approval of firefighters' public comments regarding the department's plans, policies, or administration, and forbidding unauthorized comment on fires or department business generally, violates the firefighters' free speech rights as written, where the regulations are applied to the firefighters who publicly protested a decrease in minimum staffing requirements, which is a matter of public interest, and there is no evidence that the protests had a deleterious effect on department operations.<sup>[FN6]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

For a public employee's speech to be protected under the First Amendment, the speech must involve a matter of public concern. [U.S.C.A. Const.Amend. 1. Clayton v. City of Atlantic City, 722 F. Supp. 2d 581 \(D.N.J. 2010\).](#)

Even if recklessly or intentionally false statements that firefighter made at city council meeting, namely that a boy who had drowned at a beach would have been saved if the fire department's recently eliminated dive team had been present, were matters of public concern, the city's legitimate interest in maintaining public confidence in its safety workers outweighed any interest the public may have had in receiving the statements, and thus city did not violate firefighter's First Amendment rights when it suspended him in response to his statements; firefighter presented himself

at the meeting as an expert in public safety. [U.S.C.A. Const.Amend. 1. Westmoreland v. Sutherland, 718 F. Supp. 2d 884 \(N.D. Ohio 2010\).](#)

**[END OF SUPPLEMENT]**

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[\[FN1\] Berger v. Battaglia, 779 F.2d 992 \(4th Cir. 1985\).](#)

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[\[FN2\] Ferrara v. Mills, 781 F.2d 1508, 29 Ed. Law Rep. 981 \(11th Cir. 1986\).](#)

- For discussion of what constitutes a matter of public concern in the context of dismissal for exercise of an employee's rights to free speech, see [§ 199](#).

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[\[FN3\] Marinoff v. City College of New York, 357 F. Supp. 2d 672, 196 Ed. Law Rep. 237 \(S.D. N.Y. 2005\).](#)

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[\[FN4\] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 \(2006\).](#)

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[\[FN5\] Maldonado v. City of Altus, 433 F.3d 1294, 24 A.L.R. Fed. 2d 787 \(10th Cir. 2006\).](#)

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[\[FN6\] Parow v. Kinnon, 300 F. Supp. 2d 256 \(D. Mass. 2004\).](#)

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[5 U.S.C.A. App. 4 §§ 101 et seq.](#), [401 et seq.](#)

[28 U.S.C.A. § 414](#)

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## **§ 241. Generally; fiduciary nature of duties**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [112](#)

A public officer must act primarily for the benefit of the public;[FN1] by accepting a public office, one undertakes to perform all the duties of the office, and while he or she remains in such office the public has the right to demand that he or she perform such duties.[FN2] A public officer owes an undivided duty to the public whom he or she serves.[FN3] Public policy demands that an officeholder discharge his or her duties with undivided loyalty,[FN4] and that every public officer is bound to perform the duties of his or her office faithfully.[FN5] An officer's or public employee's duty of loyalty to the public and his or her superiors is similar to that of an agent of a private principal.[FN6]

As expressed otherwise, the powers delegated to a public officer are held in trust for the people and are to be exercised on behalf of the government or of all citizens who may need the intervention of the officer.[FN7] A public official is held in public trust.[FN8] That is, a public officer occupies a fiduciary relationship to the political entity on whose behalf he or she serves,[FN9] and stands in a fiduciary relationship to the citizens that he or she has been elected to serve.[FN10] Public officers are fiduciaries and, when dealing with public property, must act with the utmost good faith, fidelity, and integrity.[FN11]

However, there is some authority to the effect that a public officer may not have a fiduciary duty to perform a specified act where there is no statute requiring as much.[FN12] Furthermore, election to public office does not make one the private servant of all inquiring citizens.[FN13] Neither does the Constitution require all public employees to intercede, outside their own bureaucratic hierarchies, on behalf of persons whose rights are in jeopardy.[FN14]



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[FN1] [State v. Erie R. Co., 23 N.J. Misc. 203, 42 A.2d 759 \(Sup. Ct. 1945\)](#); [Hall v. Pierce, 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 \(1957\)](#).

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[FN2] [State ex rel. Preissler v. Dostert, 163 W. Va. 719, 260 S.E.2d 279 \(1979\)](#).

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[FN3] [Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 \(Ind. Ct. App. 1995\)](#); [Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 \(1972\)](#); [Felkner v. Chariho Regional School Committee, 968 A.2d 865 \(R.I. 2009\)](#).

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[FN4] [Clark County v. City of Las Vegas, 92 Nev. 323, 550 P.2d 779 \(1976\)](#).

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[FN5] [Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 \(1955\)](#); [State ex rel. Preissler v. Dostert, 163 W. Va. 719, 260 S.E.2d 279 \(1979\)](#).

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[FN6] [Burton Tp. of Genesee County v. Speck, 378 Mich. 213, 144 N.W.2d 347 \(1966\)](#).

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[FN7] [State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321 \(1935\)](#); [Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 \(1955\)](#).

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[FN8] [Madlener v. Finley, 161 Ill. App. 3d 796, 113 Ill. Dec. 712, 515 N.E.2d 697 \(1st Dist. 1987\)](#), judgment rev'd on other grounds, [128 Ill. 2d 147, 131 Ill. Dec. 145, 538 N.E.2d 520 \(1989\)](#).

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[FN9] [Chicago Park Dist. v. Kenroy, Inc., 78 Ill. 2d 555, 37 Ill. Dec. 291, 402 N.E.2d 181 \(1980\)](#).

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[FN10] [Felkner v. Chariho Regional School Committee, 968 A.2d 865 \(R.I. 2009\)](#).

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[FN11] [Carbo v. Redstone Tp., 960 A.2d 899 \(Pa. Commw. Ct. 2008\)](#).

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[FN12] [Madlener v. Finley, 128 Ill. 2d 147, 131 Ill. Dec. 145, 538 N.E.2d 520 \(1989\)](#).

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[FN13] [Greene v. State, 263 So. 2d 194 \(Fla. 1972\)](#).

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[FN14] [Gordon v. Degelmann, 29 F.3d 295 \(7th Cir. 1994\)](#).

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## § 242. Effect of "public duty" rule

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [103](#) to [105](#), [110](#) to [112](#)

The "public duty doctrine" provides that if a duty is owed to the public generally, there is no liability to an individual member of that group.<sup>[FN1]</sup> A "public duty" is the kind of duty owed to the public at large and is the kind of duty that requires a public official to use discretion, including professional expertise, training, and judgment.<sup>[FN2]</sup> The public duty rule presumes that statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public; such statutes create no duty of care toward individual members of the general public.<sup>[FN3]</sup> However, under an exception to the rule, a statute may have the essential purpose of protecting identifiable individuals from a particular harm and, thus, may create a "special duty" with regard to such individuals.<sup>[FN4]</sup> In order to establish an affirmative legal duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials.<sup>[FN5]</sup>

A special relationship, as required to recover in a negligence action against a government entity under the public duty doctrine, arises where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3)

gives rise to justifiable reliance on the part of the plaintiff.<sup>[FN6]</sup> Furthermore, the view has been expressed that to determine if a statute creates a special duty of a public officer to the plaintiff, the court must examine the statute and the facts of the case, and that a special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he or she fails to do his or her duty; and (6) the officer is given sufficient authority to act in the circumstances, or he or she undertakes to act in the exercise of his or her office.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [Kolbe v. State, 625 N.W.2d 721 \(Iowa 2001\)](#); [Hunt By and Through Hasty v. North Carolina Dept. of Labor, 348 N.C. 192, 499 S.E.2d 747 \(1998\)](#).

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<sup>[FN2]</sup> [Gregg v. City of Kansas City, 272 S.W.3d 353 \(Mo. Ct. App. W.D. 2008\)](#), reh'g and/or transfer denied, (Dec. 23, 2008) and transfer denied, (Jan. 27, 2009).

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<sup>[FN3]</sup> [Summers v. Harrison Const., 298 S.C. 451, 381 S.E.2d 493 \(Ct. App. 1989\)](#).

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<sup>[FN4]</sup> [Summers v. Harrison Const., 298 S.C. 451, 381 S.E.2d 493 \(Ct. App. 1989\)](#).

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<sup>[FN5]</sup> [Fryman v. Harrison, 896 S.W.2d 908 \(Ky. 1995\)](#).

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<sup>[FN6]</sup> [Babcock v. Mason County Fire Dist. No. 6, 144 Wash. 2d 774, 30 P.3d 1261 \(2001\)](#).

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<sup>[FN7]</sup> [Summers v. Harrison Const., 298 S.C. 451, 381 S.E.2d 493 \(Ct. App. 1989\)](#).

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1. In General; Responsibilities to Government and Public; Ethical Duties

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**§ 243. Necessity of performing duties honestly, in good faith, and diligently**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

Every public officer is bound to perform the duties of his or her office honestly and to the best of his or her ability.<sup>[FN1]</sup> He or she is bound to use reasonable skill and diligence in the performance of official duties.<sup>[FN2]</sup> Furthermore, government employees are required to devote their complete services and undivided attention to government service during working hours.<sup>[FN3]</sup>

An attempt by a public officer to exercise his or her powers corruptly—as under the influence of bribery or in bad faith—for some improper purpose, is null and void.<sup>[FN4]</sup>

To determine whether a public official has acted in good faith, courts use an objective standard, asking whether a reasonably prudent official, under the same or similar circumstances, could have believed that his or her conduct was justified based on the information he or she possessed when the conduct occurred.<sup>[FN5]</sup> Evidence of subjective opinions of public officials is inadmissible on the issue of good faith.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 \(1955\); State ex rel. Preissler v. Dostert, 163 W. Va. 719, 260 S.E.2d 279 \(1979\).](#)

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<sup>[FN2]</sup> [Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 \(1952\); O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 \(1945\).](#)

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<sup>[FN3]</sup> [Stone v. U.S., 683 F.2d 449 \(D.C. Cir. 1982\).](#)

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[\[FN4\] U.S. v. Jones, 176 F.2d 278 \(9th Cir. 1949\); Roosevelt County v. State Bd. of Equalization, 118 Mont. 31, 162 P.2d 887 \(1945\).](#)

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[\[FN5\] Joe v. Two 30 Nine Joint Venture, 145 S.W.3d 150 \(Tex. 2004\).](#)

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[\[FN6\] Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417 \(Tex. 2004\).](#)

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**§ 244. Duty to obey law**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

Every public official, whose duties are defined by law, is given the law and must follow it;[FN1] the law controls the performance of all public officials.[FN2] An erroneous application of law does not relieve a public official from the obligation to apply and enforce it correctly thereafter.[FN3]

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[FN1] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\).](#)

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[FN2] [Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200 \(N.D. 1990\).](#)

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[FN3] [Albert Simon, Inc. v. Myerson, 36 N.Y.2d 300, 367 N.Y.S.2d 755, 327 N.E.2d 801 \(1975\).](#)

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**§ 245. Resort to courts**

**West's Key Number Digest**

The capacity to sue is an important incident to the duties of public officers, and it is often necessary that such an official be able to ensure that he or she is acting properly by seeking court guidance.[\[FN1\]](#) In fact, a government official entrusted with the protection of citizens' property rights must not hesitate to apply to the courts for any proper assistance in the discharge of his or her duties. This is especially the case where the remedy afforded by the courts is the most efficient and effective method of securing the rights which the officials want to protect.[\[FN2\]](#) Furthermore, state officials have not only a right, but also a duty, to challenge actions to be taken pursuant to a statute that is unconstitutional.[\[FN3\]](#)

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[\[FN1\]](#) [State ex rel. Manchin v. Lively, 170 W. Va. 672, 295 S.E.2d 912 \(1982\).](#)

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[\[FN2\]](#) [Perry v. Barker, 169 W. Va. 531, 289 S.E.2d 423 \(1982\).](#)

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[\[FN3\]](#) [Durish v. Texas State Bd. of Ins., 817 S.W.2d 764 \(Tex. App. Texarkana 1991\).](#)

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## § 246. Conflicts of interest; outside employment or other outside activities

### West's Key Number Digest

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### A.L.R. Library

[Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests, or relationships, 22 A.L.R.4th 237](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 83, 84](#) (Complaint, petition, or declaration—Wrongful deposit of public funds in bank of which public officer was director)

A public official may not use his or her official power to further his or her own interest<sup>[FN1]</sup> and is not permitted to place herself or himself in a position that will subject him or her to conflicting duties<sup>[FN2]</sup>—that is in a position where his or her private interest conflicts with his or her public duty<sup>[FN3]</sup>—or cause him or her to act,<sup>[FN4]</sup> or expose him or her to the temptation of acting,<sup>[FN5]</sup> in any manner other than in the best interests of the public. A conflicting interest arises when a public official has an interest not shared in common with the other members of the public; there cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions.<sup>[FN6]</sup> A conflict of interest arises when the public official has an interest not shared in common with the other members of the public.<sup>[FN7]</sup> A remote and speculative interest will not be held to disqualify an official on conflict of interest grounds.<sup>[FN8]</sup> When conflicts of interest arise between an office holder's private interests and public duties, it is proper that the office holder recuse himself or herself from the matter in which the conflict arises.<sup>[FN9]</sup>

For example, public officers may not contract with the public agency which they represent or have a private interest in its contracts.<sup>[FN10]</sup> Also, an officer cannot lawfully act as the agent of one person where the private agency will come in conflict with his or her official duties; to act for one of the parties implies an interest adverse to the other.<sup>[FN11]</sup> Furthermore, the view has been followed that any interest which a public officer acquires which is adverse to those of the public, without a full disclosure, is a betrayal of trust and a breach of confidence.<sup>[FN12]</sup>

It has been stated that the law does not forbid the holding of an office and exercising powers thereunder because of a possibility of a future conflict of interest.<sup>[FN13]</sup> With regard to conflicts of interest, a public officer's good faith is of no moment because it is the policy of the law to keep him or her so far from temptation as to insure the exercise of unselfish public interest.<sup>[FN14]</sup> This policy is not limited to a single category of public officer but applies to all public officials.<sup>[FN15]</sup> In this regard, it has been stated that conflict of interest provisions are aimed not only at the actual bad-faith abuse of power for an officer's own personal benefit, but are also designed to prevent the creation of relationships which carry in them the potential of such abuse, by removing the possibility of temptation.<sup>[FN16]</sup>



**Observation:** The test for disqualification of a public official due to a conflict of interest is fact-sensitive and depends on whether, under the circumstances, a particular interest had the likely capacity to tempt the official to depart from his or her sworn public duty.[\[FN17\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Provision of Nevada Ethics in Government Law requiring legislators with conflicts of interest to recuse themselves from voting on the matter did not violate legislator's First Amendment right to freedom of speech; legislator had no personal right to vote, but could only vote as a trustee for the people. [U.S.C.A. Const.Amend. 1](#); West's [NRSA 281A.420](#). [Nevada Com'n on Ethics v. Carrigan, 131 S. Ct. 2343 \(2011\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Cotlar v. Warminster Tp., 8 Pa. Commw. 163, 302 A.2d 859 \(1973\)](#).

- As to contracts entered into by a public officer in his or her individual capacity, the effect of which is to create a personal interest which may conflict with the officer's public duty, see [§ 256](#).

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[\[FN2\] Anderson v. Zoning Commission of City of Norwalk, 157 Conn. 285, 253 A.2d 16 \(1968\); Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 \(1972\)](#).

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[\[FN3\] Barry v. Historic Dist. Com'n of Borough of Litchfield, 108 Conn. App. 682, 950 A.2d 1 \(2008\)](#), certification denied, [289 Conn. 942, 959 A.2d 1008 \(2008\)](#) and certification denied, [289 Conn. 942, 959 A.2d 1008 \(2008\)](#); [Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 \(Ind. Ct. App. 1995\)](#).

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[\[FN4\] Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 \(1972\)](#).

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[\[FN5\] Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 \(Ind. Ct. App. 1995\); Mountain Hill, L.L.C. v. Township Committee of Tp. of Middletown, 403 N.J. Super. 146, 958 A.2d 1 \(App. Div. 2008\)](#), certification denied (N.J. Jan. 20, 2009) and certification denied (N.J. Jan. 20, 2009).

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[\[FN6\] Wyzykowski v. Rizas, 132 N.J. 509, 626 A.2d 406 \(1993\)](#).

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[\[FN7\] Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094 \(App. Div. 2006\)](#).

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[\[FN8\] Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094 \(App. Div. 2006\)](#).

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[\[FN9\] People ex rel. Smith v. Brown, 356 Ill. App. 3d 1096, 293 Ill. Dec. 336, 828 N.E.2d 306 \(3d Dist. 2005\)](#).

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[\[FN10\] § 256.](#)

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[\[FN11\] Lake De Smet Reservoir Co. v. Kaufmann, 75 Wyo. 87, 292 P.2d 482 \(1956\).](#)

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[\[FN12\] Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 \(1972\).](#)

- As to contracts which would result in a conflict of interest on the part of the public officer or employee, see [§§ 247 et seq.](#)

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[\[FN13\] Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 \(1972\).](#)

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[\[FN14\] Housing Authority of City of New Haven v. Dorsey, 164 Conn. 247, 320 A.2d 820 \(1973\); Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 \(Ind. Ct. App. 1995\).](#)

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[\[FN15\] Housing Authority of City of New Haven v. Dorsey, 164 Conn. 247, 320 A.2d 820 \(1973\).](#)

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[\[FN16\] Curtis v. State, 868 So. 2d 672 \(Fla. Dist. Ct. App. 1st Dist. 2004\); Brown v. Kirk, 64 Ill. 2d 144, 355 N.E.2d 12 \(1976\); Mountain Hill, L.L.C. v. Township Committee of Tp. of Middletown, 403 N.J. Super. 146, 958 A.2d 1 \(App. Div. 2008\),](#) certification denied (N.J. Jan. 20, 2009) and certification denied (N.J. Jan. 20, 2009).

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[\[FN17\] Thompson v. City of Atlantic City, 190 N.J. 359, 921 A.2d 427 \(2007\).](#)

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**§ 247. Conflicts of interest; outside employment or other outside activities—Statutory or administrative provisions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

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[Validity, construction, and application of regulations regarding outside employment of governmental employees or officers, 62 A.L.R.5th 671](#)

A federal statute prohibits, subject to criminal liability, conflicts of interest.[FN1] Statutory conflicts of interest provisions also exist in some states;[FN2] the legislative intent of some such provisions has been said to engender confidence in public bodies and to eliminate situations in which preference or undue influence could come to bear in the operation of government.[FN3]

Some states and localities have regulations which forbid or regulate outside employment of public employees and public officers. Thus, for example, administrative code provisions have prohibited a state employee from engaging in outside employment or other outside activity not compatible with the full and proper discharge of his or her public duties and responsibilities, and have provided that the outside employment or other outside activity must not impair his or her independence of judgment as to his or her official responsibilities, pose a likelihood of conflict of interest, or require him or her or persuade him or her to disclose confidential information acquired by him or her as a result of his or her official duties.[FN4] Such a provision has been upheld as not unconstitutionally vague or overbroad for failure to give certain public employees notice of what was prohibited.[FN5] Other such regulations have also been upheld against assertions that they were vague and overbroad.[FN6] Regulations concerning the outside employment of governmental employees or officers have also been upheld as against the contention that they were unreasonable,[FN7] although the position has been taken that an ordinance concerning outside employment operates as a direct infringement upon the basic individual freedom of the right to work, and is unconstitutional as violative of the due process provisions of the state and federal constitutions.[FN8] Regulations prohibiting outside employment have also been challenged on other grounds but have been held valid as against claims that such regulations deprived employees of their rights under a state constitution to enjoy life and liberty and to acquire and protect property.[FN9]

However, equal protection is violated when an outside employment policy is discriminatorily applied, as where some employees are permitted to engage in outside employment while others are prohibited from doing so.[FN10]

A state statute dealing with conflict-of-interest activities of local agency officers or employees did not preclude a public employer from imposing restrictions on off-duty employment not specifically mentioned in the statute, where the

statute's legislative history indicated that it was intended to leave local agencies free to set standards different or more rigorous than those suggested in the enactment.<sup>[FN11]</sup>

Statutes dealing with conflicts of interest may provide that a person is not disqualified from holding an office or position that conflicts with other interests of that person. Such laws may provide that if such conflicts exist, one of two things must occur—either the person complies with the requirements of the statutes by absenting herself or himself during consideration of proposals and votes thereon, or the contract or other action is a nullity and the person is subject to criminal prosecution.<sup>[FN12]</sup>

**Observation:** Federal statutes known as the Hatch Act place restrictions on political activities by federal employees, and are applicable to the political activities of state and local government employees if their principal employment is in connection with an activity that is partially or fully financed by the Federal Government.<sup>[FN13]</sup> Furthermore, most states have legislation regulating the political activities of public employees.<sup>[FN14]</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Provision of Nevada Ethics in Government Law prohibiting a legislator with a conflict of interest in regard to a proposed statute from advocating its passage or failure during the legislative debate was a reasonable time, place, and manner limitation under the First Amendment. U.S.C.A. Const.Amend. 1; West's NRSA 281A.420(2). Nevada Com'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

### [END OF SUPPLEMENT]

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<sup>[FN1]</sup> §§ 370 et seq.

<sup>[FN2]</sup> Burgess v. City of Baton Rouge, 951 So. 2d 1128 (La. Ct. App. 1st Cir. 2006); Vokal v. Nebraska Accountability and Disclosure Com'n, 276 Neb. 988, 759 N.W.2d 75 (2009); Williams v. Augusta County School Bd., 248 Va. 124, 445 S.E.2d 118, 92 Ed. Law Rep. 686 (1994).

<sup>[FN3]</sup> State v. Ross, 214 Ariz. 280, 151 P.3d 1261 (Ct. App. Div. 1 2007), as amended, (Mar. 28, 2007) and review denied, (Sept. 25, 2007); Klistoff v. Superior Court, 157 Cal. App. 4th 469, 68 Cal. Rptr. 3d 704 (2d Dist. 2007), as modified, (Dec. 14, 2007); In re Advisory Committee on Professional Ethics Opinion 705, 192 N.J. 46, 926 A.2d 839 (2007).

<sup>[FN4]</sup> Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 (Ind. Ct. App. 1995).

- As to the rights of public officers and employees to engage in political activities, and the government's ability to restrict such activities, see § 239.

<sup>[FN5]</sup> Indiana State Ethics Com'n v. Nelson, 656 N.E.2d 1172 (Ind. Ct. App. 1995).

[\[FN6\] Trelfa v. Village of Centre Island, 54 A.D.2d 985, 389 N.Y.S.2d 22 \(2d Dep't 1976\).](#)

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[\[FN7\] Johnson v. Trader, 52 So. 2d 333 \(Fla. 1951\); Jurgens v. Davenport, R.I. & N. Ry. Co., 249 Iowa 711, 88 N.W.2d 797 \(1958\); Flood v. Kennedy, 12 N.Y.2d 345, 239 N.Y.S.2d 665, 190 N.E.2d 13 \(1963\); Croft v. Lambert, 228 Or. 76, 357 P.2d 513, 88 A.L.R.2d 1227 \(1960\).](#)

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[\[FN8\] City of Crowley Firemen v. City of Crowley, 280 So. 2d 897, 94 A.L.R.3d 1221 \(La. 1973\).](#)

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[\[FN9\] Hopwood v. City of Paducah, 424 S.W.2d 134 \(Ky. 1968\).](#)

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[\[FN10\] Gosney v. Sonora Independent School Dist., 603 F.2d 522 \(5th Cir. 1979\).](#)

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[\[FN11\] Long Beach Police officers Assn. v. City of Long Beach, 46 Cal. 3d 736, 250 Cal. Rptr. 869, 759 P.2d 504 \(1988\).](#)

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[\[FN12\] Coyne v. State ex rel. Thomas, 595 P.2d 970 \(Wyo. 1979\).](#)

- As to personal interests of public officers or employees in contracts, generally, see [§ 256](#).

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[\[FN13\] Am. Jur. 2d, Elections § 460.](#)

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[\[FN14\] Am. Jur. 2d, Elections § 461.](#)

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**§ 248. Overview; Federal Ethics in Government Act, generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

Statutes have been enacted in some states with regard to conflicts of interest of government officers or employees.<sup>[FN1]</sup> Furthermore, Congress has enacted various laws requiring financial disclosure on the part of certain public officers and employees,<sup>[FN2]</sup> as well as the establishment of an Office of Government Ethics,<sup>[FN3]</sup> which laws are commonly known as the Ethics in Government Act of 1978.<sup>[FN4]</sup> By the Act, Congress sought to increase public confidence in all three branches of the Federal Government, to demonstrate the high level of integrity of the vast majority of government officials, to deter conflicts of interest from arising, to deter some persons who should not be entering public service from doing so, and to better enable the public to judge the performance of public officials.<sup>[FN5]</sup>

Statutes make provision for the authority and functions of the Office of Government Ethics,<sup>[FN6]</sup> and also provide authorization for administrative provisions,<sup>[FN7]</sup> the promulgations of rules and regulations,<sup>[FN8]</sup> appropriations,<sup>[FN9]</sup> and provide for the acceptance of certain gifts, donations, bequests, and the like for the purpose of aiding or facilitating the work of the Office of Government Ethics.<sup>[FN10]</sup>

The target of an investigation by independent counsel may be entitled to reimbursement of attorney's fees under the Ethics in Government Act only if: (1) he or she is a subject of such an investigation; (2) the fees were incurred during the investigation; (3) the fees would not have been incurred but for the requirements of the Act; and (4) the fees are reasonable.<sup>[FN11]</sup> The former subject of an investigation by independent counsel is rendered ineligible for reimbursement of attorney fees, under the Ethics in Government Act, by the fact that he or she is indicted and convicted for conduct which was the subject of the investigation, even though he or she is subsequently granted a full Presidential pardon.<sup>[FN12]</sup> A petitioner seeking reimbursement of attorney's fees incurred in defending against an investigation under the Ethics in Government Act bears the burden of establishing all elements of his or her entitlement.<sup>[FN13]</sup>

All state officers' powers are fixed by law, and all persons dealing with them are charged with notice of the limitations on those powers.<sup>[FN14]</sup>

The United States does not waive its sovereign immunity under ethical standards governing conduct of the Department of Education and its employees, including the Ethics in Government Act.<sup>[FN15]</sup>

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<sup>[FN1]</sup> § 247.

[\[FN2\] § 250.](#)

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[\[FN3\] 5 U.S.C.A. App. 4 §§ 401 et seq.](#)

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[\[FN4\] Act Oct. 26, 1978, Pub. L. No. 95-521 § 1,92 Stat 1824.](#)

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[\[FN5\] Duplantier v. U.S., 606 F.2d 654 \(5th Cir. 1979\).](#)

- As to conflicts of interest, generally [§ 246.](#)

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[\[FN6\] 5 U.S.C.A. App. 4 § 402.](#)

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[\[FN7\] 5 U.S.C.A. App. 4 § 403.](#)

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[\[FN8\] 5 U.S.C.A. App. 4 § 404.](#)

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[\[FN9\] 5 U.S.C.A. App. 4 § 405.](#)

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[\[FN10\] 5 U.S.C.A. App. 4 § 403\(b\).](#)

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[\[FN11\] In re Cisneros \(Needle Fee Application\), 454 F.3d 334 \(D.C. Cir. 2006\).](#)

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[\[FN12\] In re Madison Guar. Sav. & Loan \(McDougal Fee Application\), 353 F.3d 53 \(D.C. Cir. 2004\).](#)

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[\[FN13\] In re Madison Guar. Sav. & Loan, Clinton Fee Application, 334 F.3d 1119 \(D.C. Cir. 2003\).](#)

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[\[FN14\] State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316 \(Tex. 1999\).](#)

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[\[FN15\] Scherer v. U.S., 241 F. Supp. 2d 1270, 174 Ed. Law Rep. 262 \(D. Kan. 2003\), aff'd, 78 Fed. Appx. 687 \(10th Cir. 2003\).](#)

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## **§ 249. Financial disclosure requirements; state and local provisions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#), [111](#)

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[Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests, or relationships, 22 A.L.R.4th 237](#)

Constitutional and statutory provisions in some states, and certain local provisions, require some financial disclosures by certain public officials or employees.<sup>[FN1]</sup> Four major legitimate concerns for advancing a financial disclosure statute are: (1) the public's right to know an official's interests; (2) deterrence of corruption and conflicting interest; (3) creation of public confidence in the state's public officials; and (4) assistance in detecting and prosecuting officials who violate the law.<sup>[FN2]</sup> Disclosure of a specified governmental official's financial affairs may be necessary to further a legitimate and compelling state interest, in that disclosure assists in preserving the integrity of the political process. It is legitimate for a legislature to provide a means for effectively investigating possible conflicts of interest. Disclosure requirements promote integrity, fairness, and public confidence in government, as well as providing the citizens with information concerning an office holder's integrity and fitness for office.<sup>[FN3]</sup>

A financial disclosure law may only require reports when there is a relation between the function of the office the person holds and the source, nature, or vocation of the income.<sup>[FN4]</sup>



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[FN1] [Igneri v. Moore, 898 F.2d 870 \(2d Cir. 1990\)](#) (New York statute applicable to political party chairpersons of county committees of counties with specified populations); [U.S. v. Jennings, 487 F.3d 564 \(8th Cir. 2007\)](#) (Minnesota statute); [Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 814 \(1985\)](#) (county code applicable to "regulatory employees"); [Missouri Ethics Com'n v. Thomas, 956 S.W.2d 456 \(Mo. Ct. App. W.D. 1997\)](#), as modified, (Dec. 23, 1997) (statutory provisions); [Rendell v. Pennsylvania State Ethics Com'n, 961 A.2d 209 \(Pa. Commw. Ct. 2008\)](#) (statutory provisions).

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[FN2] [Plante v. Smathers, 372 So. 2d 933 \(Fla. 1979\)](#).

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[FN3] [Advisory Opinion on Constitutionality of 1975 PA 227 \(Questions 2-10\), 396 Mich. 465, 242 N.W.2d 3 \(1976\)](#).

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[FN4] [Witt v. Morrow, 70 Cal. App. 3d 817, 139 Cal. Rptr. 161 \(4th Dist. 1977\)](#).

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## § 250. Financial disclosure requirements; federal provisions

### West's Key Number Digest

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Congress has prescribed, by statute, financial disclosure requirements applicable to federal personnel.<sup>[FN1]</sup> The statute specifies definitions.<sup>[FN2]</sup> The applicable provisions detail which persons are required to file financial reports,<sup>[FN3]</sup> the information which must be provided in the reports,<sup>[FN4]</sup> the requirements for filing the reports,<sup>[FN5]</sup> and custody of, and public access to, the reports.<sup>[FN6]</sup> Furthermore, provision is made for the bringing of civil actions<sup>[FN7]</sup> and civil liability<sup>[FN8]</sup> for the failure to file the reports required or for the filing of false reports.

The statutes also provide for the review of reports,<sup>[FN9]</sup> and provide specific requirements as to confidential reports and other additional disclosure requirements,<sup>[FN10]</sup> and the authority under the provisions of the Comptroller General,<sup>[FN11]</sup> including his or her authority to access the financial disclosure reports for the purposes of carrying out his or her statutory responsibilities.<sup>[FN12]</sup> Specific provision is also made with regard to persons and bodies to administer the applicable statutes.<sup>[FN13]</sup>

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<sup>[FN1]</sup> 5 U.S.C.A. App. 4 §§ 101 et seq.

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<sup>[FN2]</sup> 5 U.S.C.A. App. 4 § 109.

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<sup>[FN3]</sup> 5 U.S.C.A. App. 4 § 101.

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<sup>[FN4]</sup> 5 U.S.C.A. App. 4 § 102.

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<sup>[FN5]</sup> 5 U.S.C.A. App. 4 § 103.

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<sup>[FN6]</sup> 5 U.S.C.A. App. 4 § 105.

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<sup>[FN7]</sup> § 332.

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<sup>[FN8]</sup> § 332.

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<sup>[FN9]</sup> 5 U.S.C.A. App. 4 § 106.

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<sup>[FN10]</sup> 5 U.S.C.A. App. 4 § 107.

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[\[FN11\] 5 U.S.C.A. App. 4 § 108.](#)

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[\[FN12\] 5 U.S.C.A. App. 4 § 108\(a\).](#)

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[\[FN13\] 5 U.S.C.A. App. 4 § 111.](#)

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**§ 251. Validity**

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Ethics and financial disclosure laws have been challenged on various constitutional and legal grounds, and have often survived these attempts to contest their validity. Thus, such laws have been held to be valid against challenges that the requirements violated public officers' or employees' rights to privacy,[FN1] due process,[FN2] equal protection,[FN3] or that such laws were invalid ex post facto laws,[FN4] were unconstitutionally vague[FN5] or void for overbreadth,[FN6] constituted an unreasonable search or seizure,[FN7] violated the attorney-client privilege under the Fifth and Sixth Amendments,[FN8] or violated other constitutional rights.[FN9] Statutes, executive orders, and other rules requiring public officials and employees to disclose personal or family financial conditions, interests, and associations have also been upheld despite contentions that no authority was generally vested in, or properly delegated to, the particular body, agency, or official to enact or promulgate such a law or regulation.[FN10] Neither did a state's public ethics act unconstitutionally delegate legislative authority or unlawfully discriminate against elected local officials vis-a-vis some elected state officials, because the state officials could participate in the appointment of Ethics Commission members.[FN11]

On the other hand, the due process rights of public officials were violated by a provision of a state's ethics act requiring public officials, as a condition for taking an oath of office, continuing to perform duties, or receiving payment for services, to file financial information concerning themselves or their immediate families, where the provision imposed criminal liability for noncompliance, and where the officials might have no means to acquire and file the required information.[FN12] In addition, a statute which required employees who earned a salary of more than a stated amount to disclose their finances to the public in an annual questionnaire was unconstitutional to the extent that it failed to afford employees an opportunity to present claims for privacy.[FN13] Also, a requirement by a federal agency that its employees disclose the names of all corporations, companies, firms, nonprofit organizations, or other enterprises with which the employee, his or her spouse, minor child, or dependents were connected as, inter alia, employee, officer, director, trustee, or consultant unconstitutionally intruded into the employee's rights of free association and privacy.[FN14] Financial disclosure provisions of a state ethics act, as applied to judges, have been deemed to be unconstitutional as a violation of the separation of powers doctrine, where the statutes involved infringed upon the power of the state supreme court to supervise the courts and where the Supreme Court had promulgated a code of judicial conduct advancing the same interests as the ethics act provisions.[FN15] Financial disclosure provisions as applied to attorneys have been held, in some instances, to encroach upon the inherent and exclusive power of a state's court system to regulate the conduct of attorneys,[FN16] although there is also some authority to the contrary.[FN17]

The exclusion of appointed officials from an ethics law had an unconstitutional effect in violating the right of those persons not exempted to equal protection of the laws.[FN18] Executive orders which required the disclosure of personal or family financial interests, associations, and conditions by public officials or employees may be invalid or not legally enforceable, where the governor or body involved lacked the constitutional authority to promulgate such an order.[FN19]

The prosecution of a state senator for willfully providing false information in a financial disclosure statement filed pursuant to a state conflict of interest law has been held not to be beyond the power of the executive branch.[FN20]

## **CUMULATIVE SUPPLEMENT**

### **Cases:**

Provision of Nevada Ethics in Government Law prohibiting a legislator with a conflict of interest in regard to a proposed statute from advocating its passage or failure during the legislative debate was a reasonable time, place, and manner limitation under the First Amendment. [U.S.C.A. Const.Amend. 1](#); West's [NRSA 281A.420\(2\)](#). [Nevada Com'n on Ethics v. Carrigan, 131 S. Ct. 2343 \(2011\)](#).

**[END OF SUPPLEMENT]**

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[FN1] [Plante v. Gonzalez, 575 F.2d 1119 \(5th Cir. 1978\)](#); [Herschaft v. New York City Campaign Finance Bd., 127 F. Supp. 2d 164 \(E.D. N.Y. 2000\)](#), aff'd, [10 Fed. Appx. 21 \(2d Cir. 2001\)](#); [Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 814 \(1985\)](#).

- As to rights and duties of civil servants, generally, see [Am. Jur. 2d, Civil Service §§ 41 et seq.](#)

- As to eligibility and qualifications of candidates for office, generally, see [Am. Jur. 2d, Elections §§ 246 et seq.](#)

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[FN2] [Gideon v. Alabama State Ethics Commission, 379 So. 2d 570 \(Ala. 1980\)](#); [Snider v. Shapp, 45 Pa. Commw. 337, 405 A.2d 602 \(1979\)](#).

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[FN3] [Eisenbud v. Suffolk County, 841 F.2d 42 \(2d Cir. 1988\)](#); [Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 814 \(1985\)](#); [Watkins v. New York State Ethics Com'n, 147 Misc. 2d 350, 554 N.Y.S.2d 955 \(Sup 1990\)](#).

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[FN4] [Florida Commission on Ethics v. Plante, 369 So. 2d 332 \(Fla. 1979\)](#); [Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 332 \(1976\)](#); [Lehrhaupt v. Flynn, 140 N.J. Super. 250, 356 A.2d 35 \(App. Div. 1976\)](#), judgment aff'd, [75 N.J. 459, 383 A.2d 428 \(1978\)](#).

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[FN5] [Nevada Com'n on Ethics v. Ballard, 120 Nev. 862, 102 P.3d 544 \(2004\)](#); [Grygas v. New York State Ethics Com'n, 147 Misc. 2d 312, 554 N.Y.S.2d 779 \(Sup 1990\)](#).

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[FN6] [Comer v. City of Mobile, 337 So. 2d 742 \(Ala. 1976\)](#).

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[FN7] [Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810 \(1978\)](#); [Forney v. State Ethics Commission, 56 Pa. Commw. 539, 425 A.2d 66 \(1981\)](#).

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[FN8] [Chamberlin v. Missouri Elections Commission, 540 S.W.2d 876 \(Mo. 1976\)](#).

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[FN9] [Slevin v. City of New York, 551 F. Supp. 917 \(S.D. N.Y. 1982\)](#), decision aff'd in part, rev'd in part on other grounds, [712 F.2d 1554 \(2d Cir. 1983\)](#).

- As to powers and duties of police officers, generally, see [Am. Jur. 2d, Sheriffs, Police, and Constables §§ 30 et seq.](#)

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[FN10] [Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 \(App. Div. 1976\)](#), judgment aff'd, [75 N.J. 458, 383 A.2d 428 \(1978\)](#); [Pennsylvania State Ass'n of Tp. Sup'rs v. Thornburgh, 45 Pa. Commw. 361, 405 A.2d 614 \(1979\)](#).

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[FN11] [Pennsylvania State Ass'n of Tp. Sup'rs v. Thornburgh](#), 45 Pa. Commw. 361, 405 A.2d 614 (1979).

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[FN12] [Denoncourt v. Com., State Ethics Com'n](#), 504 Pa. 191, 470 A.2d 945, 15 Ed. Law Rep. 1209 (1983).

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[FN13] [Hunter v. City of New York](#), 58 A.D.2d 136, 396 N.Y.S.2d 186 (1st Dep't 1977), order aff'd, 44 N.Y.2d 708, 405 N.Y.S.2d 455, 376 N.E.2d 928 (1978).

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[FN14] [American Federation of Government Emp., Local 421 v. Schlesinger](#), 443 F. Supp. 431 (D.D.C. 1978).

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[FN15] [Kremer v. State Ethics Com'n](#), 503 Pa. 358, 469 A.2d 593 (1983).

- As to powers and duties of judges, generally, see [Am. Jur. 2d, Judges §§ 21 et seq.](#)

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[FN16] [In re The Florida Bar](#), 316 So. 2d 45 (Fla. 1975); [Ballou v. State Ethics Commission](#), 56 Pa. Commw. 240, 424 A.2d 983 (1981), aff'd in part, 496 Pa. 127, 436 A.2d 186 (1981).

- As to judicial supervision of the legal profession, generally, see [Am. Jur. 2d, Attorneys as Law §§ 13 et seq.](#)

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[FN17] [Opinion of the Justices to the Senate](#), 375 Mass. 795, 376 N.E.2d 810 (1978) (holding that disclosures by lawyers and judicial personnel did not violate separation of powers requirements of a state constitution); [Maunus v. Com., State Ethics Com'n](#), 518 Pa. 592, 544 A.2d 1324 (1988) (holding that a requirement that attorneys employed by a liquor control board comply with the financial report and disclosure requirements of a state ethics act did not constitute an unconstitutional intrusion of the legislature on the authority of the state supreme court to regulate the conduct of attorneys).

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[FN18] [Snider v. Thornburgh](#), 496 Pa. 159, 436 A.2d 593 (1981).

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[FN19] [Rapp v. Carey](#), 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745 (1978); [Shapp v. Butera](#), 22 Pa. Commw. 229, 348 A.2d 910 (1975).

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[FN20] [§ 406.](#)

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## § 252. Generally

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Generally, only persons authorized by the Constitution or a statute can make a contract binding on the State.<sup>[FN1]</sup> A public officer may make for the government he or she represents only such contracts as he or she is authorized by law to make,<sup>[FN2]</sup> and he or she must comply with the requirements of law in respect of the manner in which, and the conditions upon which, contracts may be entered into.<sup>[FN3]</sup>

**Observation:** A contract by a public officer in excess of the provisions of the statute authorizing the contract is void, so far as it departs from, or exceeds the terms of, the law under which it was attempted to be negotiated.<sup>[FN4]</sup>

A state statute which provides that, to encourage development and expansion of the prison industries program, a prison industries office could enter into necessary contracts related to the prison industries program, and with board approval could enter into a contract with a private business to conduct a program on or off property operated by the state department of criminal justice, does not authorize the department to make a direct contract, absent board approval, for purchases of a soy-based meat substitute for repackaging and resale, both to the department's Food Services division for inmate consumption and to other states.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316 \(Tex. 1999\).](#)

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<sup>[FN2]</sup> [Lincoln Highway Realty, Inc. v. State, 128 N.J. Super. 35, 318 A.2d 795 \(Ch. Div. 1974\).](#)

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[\[FN3\] First Nat. Bank v. Filer, 107 Fla. 526, 145 So. 204, 87 A.L.R. 267 \(1933\).](#)

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[\[FN4\] Baker v. Deschutes County, 10 Or. App. 236, 498 P.2d 803 \(1972\).](#)

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[\[FN5\] State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316 \(Tex. 1999\).](#)

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## **§ 253. Contracts extending beyond term of office**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [112](#)

The power of public officers to enter into contracts which extend beyond the terms of their offices depends primarily on the extent of their authority under the law.[\[FN1\]](#) Under a distinction sometimes drawn between two classes of powers—governmental or legislative and proprietary or business powers—in the exercise of the governmental or legislative powers, a board, in the absence of statutory provision, cannot make a contract extending beyond its own



term, but, in the exercise of business or proprietary powers, may contract as any individual, unless restrained by statutory provision to the contrary.<sup>[FN2]</sup> Contracts extending beyond the terms of the officers executing them will be held invalid where the making of the contracts tends to limit or diminish the efficiency of those who will succeed the incumbents in office or usurps power which was clearly intended to be given to the successors.<sup>[FN3]</sup>

Contracts pertaining to the ordinary business affairs of a municipality or county, such as contracts for water supply, street lighting, and the leasing of municipal property to private parties, are ordinarily upheld, although extending beyond the term of the officer making them, in the absence of fraud or other inequitable circumstances.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Cox v. Greene County, 26 Tenn. App. 628, 175 S.W.2d 150 \(1943\).](#)

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<sup>[FN2]</sup> [Hargett v. Kentucky State Fair Bd., 309 Ky. 132, 216 S.W.2d 912 \(1949\); Cox v. Greene County, 26 Tenn. App. 628, 175 S.W.2d 150 \(1943\).](#)

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<sup>[FN3]</sup> [Modjeski and Masters v. Pack, 215 Tenn. 629, 388 S.W.2d 144 \(1965\); Cox v. Greene County, 26 Tenn. App. 628, 175 S.W.2d 150 \(1943\).](#)

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<sup>[FN4]</sup> [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 135.](#)

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**§ 254. Contracts tending to interfere with public duties or interests**

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A contract made by a public officer is against public policy, and unenforceable, if it interferes with the unbiased discharge of his or her duty to the public in the exercise of his or her office,[\[FN1\]](#) or if it places him or her in a position inconsistent with his or her duty as trustee for the public, or even if it has a tendency to induce him or her to violate such duty.[\[FN2\]](#) Such contracts are invalid, although there may be no statute or charter provision prohibiting them[\[FN3\]](#) and although there may have been no actual loss or detriment to the public[\[FN4\]](#) or fraudulent intent in entering into the contracts,[\[FN5\]](#) since the rule invalidating the contracts is based on public policy.[\[FN6\]](#)

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[\[FN1\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\); Nampa Highway Dist. No. 1 v. Graves, 77 Idaho 381, 293 P.2d 269 \(1956\).](#)

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[\[FN2\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\); Githens v. Butler County, 350 Mo. 295, 165 S.W.2d 650 \(1942\).](#)

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[\[FN3\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\); Sellars v. Lamb, 303 Mich. 604, 6 N.W.2d 911 \(1942\).](#)

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[\[FN4\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\); Sellars v. Lamb, 303 Mich. 604, 6 N.W.2d 911 \(1942\).](#)

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[\[FN5\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\).](#)

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[\[FN6\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\).](#)

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**§ 255. Contracts tending to interfere with public duties or interests—Contracts restricting official discretion**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [112](#)

An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good vested in one acting in a public official capacity is illegal and reprobated by the courts, so that no redress can be given to a party who sues for herself or himself in respect of it.[\[FN1\]](#)

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[\[FN1\]](#) [Smith v. Ouzts, 214 Ga. 144, 103 S.E.2d 567 \(1958\); Modjeski and Masters v. Pack, 215 Tenn. 629, 388 S.W.2d 144 \(1965\).](#)

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**§ 256. Contracts tending to interfere with public duties or interests—Personal or private interests in contract**

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A contract entered into by a public officer in his or her individual capacity, the effect of which is to create a personal interest which may conflict with the officer's public duty, is contrary to public policy.<sup>[FN1]</sup> Public officers are generally prohibited from contracting with the public agency which they represent or from having a private interest in its contracts.<sup>[FN2]</sup> The rule is intended to be applied to all cases where there would be conflicting interests, and the application of a statute containing such rule does not depend on a criminal conviction of the offenses prohibited.<sup>[FN3]</sup>

A contract entered into by a board with one of its own members is void, or at least voidable, even in the absence of a statutory prohibition, since in such case the member's public duty and his or her private interests are directly antagonistic. Furthermore, this result is not affected by the fact that the officer made his or her private interests subservient to his or her public duties.<sup>[FN4]</sup>

The interest of a public officer as a stockholder in a corporation entering into a contractual relation with the public is a prohibited interest—at least where the interest is substantial—in the transaction within the meaning of statutory provisions in substance prohibiting a public officer from being interested directly or indirectly in any contract with the public, and of the common-law principle against such interest, based on public policy, of which such statutory provisions are the concrete expression.<sup>[FN5]</sup> A stronger case of interest exists where public officers are not only stockholders but also officers of corporations with which the public has attempted to enter into a contract. The interest of the parties in such cases is clearly within the meaning of provisions prohibiting public officers from being interested directly or indirectly in contracts with the public.<sup>[FN6]</sup>

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[\[FN1\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\).](#)

- As to conflicts of interest, and outside activities of public officers and employees, generally, see §§ [246](#), [247](#).
- As to the personal interest of an officer in a contract with a municipality, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 252 et seq.](#)

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[\[FN2\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\).](#)

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[\[FN3\] State ex rel. Smith v. Bohannon, 101 Ariz. 520, 421 P.2d 877 \(1966\).](#)

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[\[FN4\] Warren v. Reed, 231 Ark. 714, 331 S.W.2d 847 \(1960\).](#)

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[\[FN5\] State v. Robinson, 71 N.D. 463, 2 N.W.2d 183, 140 A.L.R. 332 \(1942\).](#)

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[\[FN6\] State v. Robinson, 71 N.D. 463, 2 N.W.2d 183, 140 A.L.R. 332 \(1942\).](#)

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IX. Powers, Duties, and Rights, in General

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3. Handling of Public Funds and Property, Generally

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## § 257. Generally; expenditures and disbursements

### West's Key Number Digest

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### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 78](#) (Complaint, petition, or declaration—By state on relation of county attorney—Against county commissioner and sureties—Payment of invalid claim against county)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 79](#) (Complaint, petition, or declaration—Against county officer and sureties—To recover money paid officer on improper expense claims)

Public officers who have charge of public funds occupy the status merely of trustees or agents with respect to such funds, the beneficial interest in and ownership of such funds being vested in the state or other public body under whose authority, and for whose benefit, such funds have been received and deposited.<sup>[FN1]</sup> Public officers who have charge of public funds and public money are charged with the duty, as trustees, to disburse and expend the money for the purposes and in the manner prescribed by law.<sup>[FN2]</sup> Expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.<sup>[FN3]</sup> Persons charged with handling public funds are held strictly accountable for those funds.<sup>[FN4]</sup>

Individuals or entities who control public funds have a duty to account for their handling of those funds, and the reason for such duty is to prevent fraud against the public, to protect public funds, and to place final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds.<sup>[FN5]</sup> If a statute commands a public official to invest public money, there is an implied duty to perform investments in a reasonable manner.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Public Funds § 2](#).

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<sup>[FN2]</sup> [Allen v. State, 327 Ark. 350, 327 Ark. 366A, 939 S.W.2d 270 \(1997\)](#), as supplemented on denial of reh'g, (Mar. 17, 1997); [City of Newport v. McLane, 256 Ky. 803, 77 S.W.2d 27, 96 A.L.R. 655 \(1934\)](#).

- For discussion of appropriations and expenditures of public funds, generally, see [Am. Jur. 2d, Public Funds §§ 1 et seq.](#)

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<sup>[FN3]</sup> [Stanson v. Mott, 17 Cal. 3d 206, 130 Cal. Rptr. 697, 551 P.2d 1 \(1976\)](#); [In re Doe, 120 R.I. 885, 390 A.2d 390 \(1978\)](#).

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<sup>[FN4]</sup> [Smith v. Spokane County, 89 Wash. App. 340, 948 P.2d 1301 \(Div. 3 1997\)](#).

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[\[FN5\] Oriana House, Inc. v. Montgomery, 108 Ohio St. 3d 419, 2006-Ohio-1325, 844 N.E.2d 323 \(2006\).](#)

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[\[FN6\] State v. Gaul, 117 Ohio App. 3d 839, 691 N.E.2d 760 \(8th Dist. Cuyahoga County 1997\).](#)

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**§ 258. Duty to turn funds or property over to public body or successor; accounting for excess funds**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [112](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 74 to 77, 81](#) (Complaint, petition, or declaration—  
Against various public officers—failure to turn over funds)

A public officer must turn over, in accordance with law, all moneys and fees collected by virtue or under color of his or her office whenever, under the law, title to such funds vests in the public agency rather than in the officer.[\[FN1\]](#) Also, even though an officer is required to turn over fees collected by him or her in the ordinary course of his or her duties, he or she need not account for fees voluntarily paid in excess of legal fees, for work done out of regular office hours, if there was no legal compulsion to perform such work at other than office hours.[\[FN2\]](#)

By statute, all government publications and law books furnished to officers of the United States or an agency thereof must be transmitted to such officers' successors in office.[\[FN3\]](#)

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[\[FN1\] Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115, 99 A.L.R. 642 \(1935\); Breathitt County v. Cockrell, 250 Ky. 743, 63 S.W.2d 920, 92 A.L.R. 626 \(1933\).](#)

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[\[FN2\] Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115, 99 A.L.R. 642 \(1935\).](#)

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[\[FN3\] 28 U.S.C.A. § 414.](#)

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## § 259. Misuse or diversion of funds or property

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [111](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 80](#) (Complaint, petition, or declaration—Misappropriation by absconding clerk of moneys paid into court for estate—By administrator de bonis non—Against clerk and sureties on clerk's bond)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 82](#) (Complaint, petition, or declaration—Allegation—Treasurer's fraudulent appropriation of public funds)

A public officer entrusted with public funds has no right to give them away,[\[FN1\]](#) nor may he or she use them.[\[FN2\]](#) Furthermore, criminal liability may result from a public officer's or employee's misuse of public property, such as the concealment, removal, or mutilation of public records or reports.[\[FN3\]](#)

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[\[FN1\]](#) [Joint Consol. School Dist. No. 2 v. Johnson, 163 Kan. 202, 181 P.2d 504 \(1947\).](#)

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[\[FN2\]](#) [City of Milwaukee v. Drew, 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 \(1936\).](#)

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[\[FN3\]](#) [§ 376.](#)

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4. Polygraph Testing

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**§ 260. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 110 to 112

Rules regarding disclosure that can constitutionally be requested of public employees or officers under the Fifth Amendment have been extended to disclosure through the medium of a polygraph test.<sup>[FN1]</sup>

Public employees may be required, on pain of dismissal,<sup>[FN2]</sup> to answer questions specifically and narrowly relating to job performance.<sup>[FN3]</sup> However, an employee or officer who is ordered to take a polygraph examination must be informed that the questions will relate specifically to the performance of his or her official duty,<sup>[FN4]</sup> that the answers cannot be used against him or her in any subsequent criminal procedure, and that the penalty for refusing to answer is dismissal.<sup>[FN5]</sup>

A public agency's subjecting of its employees to involuntary polygraph examinations as part of an internal theft investigation, as permitted by a statute exempting public employees from a prohibition against the use of polygraph examinations by employers, has been held to have intruded upon the employees' constitutionally protected zone of individual privacy under a state constitutional provision, where the polygraph examination was specifically designed to overcome one's mental privacy by compelling communication of private thoughts, sentiments, and emotions.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Baker v. City of Lawrence, 379 Mass. 322, 409 N.E.2d 710 \(1979\).](#)

- As to financial disclosure required of public officers and employees, generally, see §§ [249](#) to [251](#).

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<sup>[FN2]</sup> [§ 189.](#)

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[\[FN3\] Long Beach City Employees Assn. v. City of Long Beach, 41 Cal. 3d 937, 227 Cal. Rptr. 90, 719 P.2d 660 \(1986\).](#)

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[\[FN4\] Gulden v. McCorkle, 680 F.2d 1070 \(5th Cir. 1982\).](#)

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[\[FN5\] Eshelman v. Blubaum, 114 Ariz. 376, 560 P.2d 1283 \(Ct. App. Div. 1 1977\); Seattle Police Officers' Guild v. City of Seattle, 80 Wash. 2d 307, 494 P.2d 485 \(1972\).](#)

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[\[FN6\] Long Beach City Employees Assn. v. City of Long Beach, 41 Cal. 3d 937, 227 Cal. Rptr. 90, 719 P.2d 660 \(1986\).](#)

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**§ 261. Generally; requirements for mandatory random or mass testing**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

[Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or Federal Government, 86 A.L.R. Fed. 420](#)

## **Trial Strategy**

[Representing Law Enforcement Officers in Personnel Disputes and Employment Litigation, 77 Am. Jur. Trials 1](#)

The Fourth Amendment to the United States Constitution prohibits the government from conducting unreasonable searches and seizures. The reasonableness of a search is to be determined in the light of the total atmosphere of the case.<sup>[FN1]</sup> The capacity of a government employee, generally, to claim the protection of the Fourth Amendment depends on whether the area searched is one in which the employee has a reasonable expectation of privacy.<sup>[FN2]</sup> However, public employees have an expectation of privacy that is somewhat diminished from that of the general public,<sup>[FN3]</sup> and a drug testing program for public employees may be upheld where it is not deemed to be an undue infringement on the justifiable expectations of the privacy of covered employees, and the government's compelling interests outweigh the employees' privacy concerns.<sup>[FN4]</sup>

Once the government requires an employer to administer random drug tests to a certain class of workers, the Fourth Amendment is implicated, and thus, a "search" effected by a urine test is subject to the Fourth Amendment's reasonableness requirement.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Searches and Seizures §§ 10 to 12.](#)

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<sup>[FN2]</sup> [Am. Jur. 2d, Searches and Seizures § 30.](#)

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<sup>[FN3]</sup> [§ 238.](#)

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<sup>[FN4]</sup> [International Union v. Winters, 385 F.3d 1003, 2004 FED App. 0337P \(6th Cir. 2004\); Warren v. Board of Educ. of City of St. Louis, 200 F. Supp. 2d 1053, 165 Ed. Law Rep. 183 \(E.D. Mo. 2001\); Law Enforcement Labor Services, Inc. v. Sherburne County, 695 N.W.2d 630 \(Minn. Ct. App. 2005\).](#)

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<sup>[FN5]</sup> [Southern California Gas Co. v. Utility Workers Union of America, Local 132, AFL-CIO, 265 F.3d 787 \(9th Cir. 2001\).](#)

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**§ 262. Effect of government's safety or security concerns on validity of mass or random testing**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#)

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[Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or Federal Government, 86 A.L.R. Fed. 420](#)

Random drug testing of public employees has sometimes been upheld based on the government's compelling interest in protecting the safety of the public<sup>[FN1]</sup> or safety in the workplace<sup>[FN2]</sup> or of public employees.<sup>[FN3]</sup> On the other hand, courts have held invalid such drug testing where there is no evidence of the government's compelling interest in protecting safety in the workplace.<sup>[FN4]</sup> Security interests are also sometimes a factor in finding that the government's interests outweigh those of the public employees subjected to mandatory drug testing;<sup>[FN5]</sup> in this regard, it has been stated that for employees with top secret clearances, random urinalysis tests are permissible regardless of the fact that some employees may be rarely, if ever, exposed to secret documents.<sup>[FN6]</sup> Yet, in order for a search proposed by the Department of Defense calling for mandatory periodic drug testing by urinalysis of civilian employees holding "critical" jobs to pass constitutional muster, the duties of the employees who would be subjected to the standardless testing had to be shown to be more than remotely or conceivably related to national security, or the

duties, if performed under the influence of drugs, had to be shown to pose a potential danger to persons or property well beyond the danger inherent in ordinary police employment. [\[FN7\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Subjecting landscaper at publicly-owned wastewater treatment plant to suspicionless, random drug testing pursuant to policy applicable to all facility employees engaged in "safety sensitive" work did not violate landscaper's rights to be free from unreasonable searches and seizures under federal and New Jersey constitutions; plant owner was a regulated entity which had a long tradition of close government supervision, and had legitimate, documented safety concerns, and ensuring safety at its sprawling treatment plant required the health and fitness of employees even in positions such as the one filled by landscaper. [U.S.C.A. Const.Amend. 4](#); [N.J.S.A. Const. Art. 1, par. 7](#); [N.J.S.A. 58:14-1](#). [Mollo v. Passaic Valley Sewerage Com'rs](#), 406 Fed. Appx. 664 (3d Cir. 2011).

### [END OF SUPPLEMENT]

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[\[FN1\] Wenzel v. Bankhead](#), 351 F. Supp. 2d 1316 (N.D. Fla. 2004) (a random employee drug testing policy, of a state Department of Juvenile Justice, violates the Fourth Amendment prohibition on nonwarrant searches and seizures, as applied to an employee who works in long-range planning, where the testing could be conducted only where there is a special need for sobriety, such as public safety or protection of juveniles, and while the employee had access to sensitive information regarding juveniles, the employee never consulted such information); [Sander v. New York City Dept. of Transp.](#), 23 A.D.3d 156, 806 N.Y.S.2d 1 (1st Dep't 2005) (testimony of the chief operations officer of the Staten Island ferry that although a city employee, an assistant captain, was assigned to the dock, he could be called upon in an emergency to man a vessel, was sufficient to support a finding of the city transportation commissioner that the employee was ready to perform, or immediately available to perform, a safety-sensitive function, and thus the employee was subject to random alcohol testing).

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[\[FN2\] Thomson v. Marsh](#), 884 F.2d 113 (4th Cir. 1989) (holding that the random urinalysis testing of civilian employees of the Army did not violate the Fourth Amendment's guarantee against unreasonable searches and seizures where the government's compelling interest in the safety of the workplace at a proving ground engineering center outweighed the employees' justifiable expectations of privacy, and noting that the chemical agents in use were extremely lethal, and if an employee working with one agent released merely a small amount of an agent in a large room, he or she would kill everyone within a few feet and seriously injure all those within a few yards); [Cragger v. Board of Educ. of Knott County, KY.](#), 313 F. Supp. 2d 690, 187 Ed. Law Rep. 892 (E.D. Ky. 2004) (random suspicionless drug testing of teachers did not violate teacher's Fourth Amendment rights; county established the existence of a drug problem in its schools and community, and there was no alternative to spot those displaying "reasonable suspicion.").

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[\[FN3\] Plane v. U.S.](#), 796 F. Supp. 1070 (W.D. Mich. 1992).

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[\[FN4\] American Federation of Teachers-West Virginia, AFL-CIO v. Kanawha County Bd. of Educ.](#), 592 F. Supp. 2d 883, 241 Ed. Law Rep. 570 (S.D. W. Va. 2009) (there was no evidence that teachers or other public school employees performed duties that were so fraught with such risks of injury to others that even a momentary lapse of attention could have

disastrous consequences, as required to deem their positions "safety sensitive" and justify school district's proposed implementation of suspicionless drug test policy).

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[FN5] [Taylor v. O'Grady, 888 F.2d 1189 \(7th Cir. 1989\)](#), holding that a county department of corrections was improperly enjoined from continuing a mandatory urinalysis screening of correction officers who had regular access to the inmate population, who had a reasonable opportunity to smuggle drugs into inmates, and who had access to firearms, where the department had an interest in ensuring a law-abiding and drug-free work force, and it had a security interest in preventing the smuggling of drugs to inmates, and the department's interests outweighed the officers' privacy interests.

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[FN6] [Hartness v. Bush, 919 F.2d 170 \(D.C. Cir. 1990\)](#).

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[FN7] [National Federation of Federal Employees v. Weinberger, 818 F.2d 935 \(D.C. Cir. 1987\)](#).

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**§ 263. Effect and necessity of suspicion or reasonable grounds for suspecting drug use**

**West's Key Number Digest**

**A.L.R. Library**

[Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or Federal Government, 86 A.L.R. Fed. 420](#)

In the context of drug testing of public employees by their employers, such a search has been considered justified where there are reasonable grounds for suspecting that a search will turn up evidence of work-related drug use;[\[FN1\]](#) whether reasonable grounds existed for suspecting that the search would turn up evidence of work-related drug use has been equated with the determination of whether the search was justified at its inception in the balancing of this factor against the government's interest in the efficient and proper operation of the workplace to determine the "reasonableness" of drug testing under the Fourth Amendment.[\[FN2\]](#) Urinalysis testing has sometimes been deemed properly required where certain public employees were individually suspected of drug use.[\[FN3\]](#)

A public employer's random program of mandatory alcohol and drug testing of certain employees has been held to violate the prohibition of the Fourth Amendment against unreasonable searches and seizures, where the testing was wholly random and was not based upon reasonable suspicion that an employee was under the influence of alcohol or drugs.[\[FN4\]](#)

Mandatory drug or alcohol testing of police or certain correctional officers, other than uniform or systematic random testing, may be made only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol or that the employee has used a controlled substance.[\[FN5\]](#) A police department and a physician do not violate the Fourth Amendment's proscription against unreasonable searches and seizures when the physician conducts a drug urinalysis without an officer's knowledge when the officer visited the physician for high blood pressure, where the officer knew the physician conducted the department's drug tests, the officer had signed a waiver allowing the department to test him for drugs at any time, with or without cause, and the department had a reasonable individualized suspicion that the officer was using drugs.[\[FN6\]](#)

A compelling state interest must justify a suspicionless drug testing policy, and the testing must be a narrowly tailored means of serving this interest.[\[FN7\]](#) In some instances, the suspicionless drug testing of public employees or applicants for public employment has been held to be valid under the Fourth Amendment based, in part, on a lowered expectation of privacy of the employees under the circumstances involved.[\[FN8\]](#) Furthermore, a mandatory, random, or selective drug testing policy may be constitutional under the Fourth Amendment based on the compelling interests of the government as overriding the privacy interests of the public employees, as, for example, based on public safety or security reasons.[\[FN9\]](#) Yet a urinalysis drug-testing program was unconstitutional insofar as it authorized mandatory drug testing of certain public workers who did not hold safety or security-sensitive jobs, absent reasonable suspicion of on-duty drug use or drug-impaired work performance.[\[FN10\]](#)

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[\[FN1\]](#) [Harmon v. Meese, 690 F. Supp. 65 \(D.D.C. 1988\)](#), order modified and remanded, [878 F.2d 484 \(D.C. Cir. 1989\)](#).



[\[FN2\] National Federation of Federal Employees v. Weinberger, 818 F.2d 935 \(D.C. Cir. 1987\).](#)

- As to the balancing of the individual's versus the government's interests in establishing the reasonableness of drug testing for Fourth Amendment purposes, see [§ 261](#).

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[\[FN3\] Allen v. Marietta Bd. of Lights and Water, Inc., 693 F. Supp. 1122 \(N.D. Ga. 1987\)](#) (public utilities employees).

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[\[FN4\] Amalgamated Transit Union, Local 1277, AFL-CIO v. Sunline Transit Agency, 663 F. Supp. 1560 \(C.D. Cal. 1987\).](#)

- As to dismissal of teachers on the grounds of immorality based on excessive or improper use of alcohol or illegal drugs, see [Am. Jur. 2d, Schools § 225](#).

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[\[FN5\] Richard v. Lafayette Fire and Police Civil Service Bd., 983 So. 2d 195 \(La. Ct. App. 3d Cir. 2008\)](#), reh'g granted, (June 18, 2008) and writ granted, [992 So. 2d 967 \(La. 2008\)](#) and writ granted, [992 So. 2d 967 \(La. 2008\)](#) and judgment aff'd, [28 I.E.R. Cas. \(BNA\) 1579, 2009 WL 307145 \(La. 2009\)](#).

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[\[FN6\] Carroll v. City of Westminster, 233 F.3d 208 \(4th Cir. 2000\).](#)

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[\[FN7\] York v. Wahkiakum School Dist. No. 200, 110 Wash. App. 383, 40 P.3d 1198, 161 Ed. Law Rep. 1023 \(Div. 2 2002\).](#)

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[\[FN8\] National Treasury Employees Union v. Hallett, 756 F. Supp. 947 \(E.D. La. 1991\)](#) (there was no Fourth Amendment infirmity in the suspicionless drug testing of applicants for customs positions involving drug interdiction, carrying a firearm, or handling classified material, where the covered positions already required background checks which significantly reduced the applicants' privacy expectations); [Doe v. City and County of Honolulu, 8 Haw. App. 571, 816 P.2d 306 \(1991\)](#) (a city fire department's suspicionless drug testing of urine specimens collected at the time of firefighters' annual physical examinations did not violate the Fourth Amendment, where the city's safety interest outweighed the firefighters' expectations of privacy, in that their privacy expectations were diminished by the annual physical, and the drug-testing program was minimally intrusive).

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[\[FN9\] § 262.](#)

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[\[FN10\] National Treasury Employees Union v. Yeutter, 918 F.2d 968 \(D.C. Cir. 1990\)](#) (certain Department of Agriculture motor-vehicle operators).

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[18 U.S.C.A. § 207](#)

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## § 264. Generally

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[Limitation, under 18 U.S.C.A. sec. 207, on participation of former Federal Government officers and employees in proceedings involving Federal Government, 71 A.L.R. Fed. 360](#)

By federal statute, certain restrictions are placed on the conduct of former officers, employees, and elected officials of the executive and legislative branches, subject to criminal punishment.<sup>[FN1]</sup> Thus, for example, former federal officers or employees of the executive branch of the United States or of the District of Columbia, who knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person, except the United States or the District of Columbia, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, in which the person participated personally and substantially as such officer or employee, and which involved a specific party or specific parties at the time of such participation, will be punished as provided by statute.<sup>[FN2]</sup> Although the statute provides criminal sanctions for the violation of its provisions, the statute has frequently been raised in cases disputing the award of government contracts. Typically, unsuccessful bidders have claimed that the representation of the successful bidder by a former government officer should void the contract award. Such an argument has been rejected by the courts.<sup>[FN3]</sup> The provisions of the statute have also been interpreted by courts attempting to determine the propriety of a former government attorney's

representation of either a federal criminal defendant or a party to civil litigation involving the Federal Government.[FN4] In this regard, while the statute[FN5] does not appear to prohibit the appearance of a former assistant United States Attorney as counsel for a defendant in a criminal prosecution for tax evasion and signing false income tax returns, the disqualification of the attorney and his firm has been upheld on the basis of the ABA Code of Professional Responsibility.[FN6]

A state statute which did not place a blanket prohibition on all representation by former public officials before former employing government agencies, but only in those matters in which the public official was directly concerned and in which he or she personally participated, was not unconstitutionally vague as failing to provide adequate notice of what conduct was prohibited by a former public official or employee.[FN7]

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[FN1] [18 U.S.C.A. § 207](#), as discussed in [§ 377](#).

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[FN2] [18 U.S.C.A. § 207\(a\)\(1\)](#), as discussed in [§ 377](#).

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[FN3] [C.A.C.I., Inc.-Federal v. U.S.](#), 719 F.2d 1567, 71 A.L.R. Fed. 338 (Fed. Cir. 1983).

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[FN4] [U.S. v. Dorfman](#), 542 F. Supp. 402 (N.D. Ill. 1982); [U.S. v. Clark](#), 333 F. Supp. 2d 789 (E.D. Wis. 2004).

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[FN5] [18 U.S.C.A. § 207](#).

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[FN6] [U.S. v. Miller](#), 624 F.2d 1198 (3d Cir. 1980) (upholding disqualification on the basis of an appearance of impropriety).

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[FN7] [State v. Nipps](#), 66 Ohio App. 2d 17, 20 Ohio Op. 3d 49, 419 N.E.2d 1128 (10th Dist. Franklin County 1979).

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X. Compensation  
A. In General

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**West's Key Number Digest**

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**Primary Authority**

[31 U.S.C.A. § 3332](#)

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## **§ 265. Overview; basis and right to compensation, generally**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96

### **A.L.R. Library**

[Validity of governmental domestic partnership enactment, 74 A.L.R.5th 439](#)

Compensation is not indispensable to a public office;[FN1] it is merely incident to the office.[FN2]

A public official is entitled only to compensation provided by law,[FN3] for whatever may be the character of the compensation—whether an annual salary, a per diem allowance, or fees for particular services—it must depend upon the will of the people speaking through their constitution, statutes, or ordinances.[FN4] The right to receive the compensation annexed to public office is legislative or constitutional in nature;[FN5] and a public official is not entitled to receive payment for services out of the public treasury, unless there is some statute authorizing such payment.[FN6] Likewise, deputies appointed by a public official cannot be paid from the public treasury in the absence of express statutory authority for such payment.[FN7] Even so, there is authority for the view that where compensation of an officer was not fixed by law at the time he or she rendered a service, but it clearly appeared that it was the intention of the lawmakers that he or she should be compensated, the officer is entitled to a reasonable compensation.[FN8]

As a rule, it is not by force of contract which entitles an elected official to a salary; rather, the law attaches the salary to the office which the official serves as a matter of public trust.[FN9] The right to compensation of public officers or employees generally does not rest on any contract, either express or implied.[FN10] However, there is some authority

for the view that promised compensation creates a contractual right which, once vested, cannot be eliminated without unconstitutionally impairing the contract obligation.[\[FN11\]](#) Also, there is some authority to the effect that an agency's implementation of a suggestion submitted pursuant to an employee suggestion program created under the Government Employees Incentive Awards Act[\[FN12\]](#) gives rise to an implied-in-fact contract between the government and the employee.[\[FN13\]](#)

Generally, however, a public officer's right to compensation depends entirely upon his or her being able to show clear warrant of law entitling him or her to remuneration for the performance of public duties.[\[FN14\]](#) There is no constitutional right to receive compensation in any amount for public service;[\[FN15\]](#) or, as is sometimes stated, there is no general constitutional requirement that every officer be compensated.[\[FN16\]](#) A law creating an office without any provision for compensation may carry with it the implication that the services are to be rendered gratuitously.[\[FN17\]](#)

Statutes providing compensation for a public officer are to be strictly construed in favor of the government[\[FN18\]](#) and are strictly construed against the officer.[\[FN19\]](#) Compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory discretion or contract negotiation.[\[FN20\]](#) Courts are prohibited by law from awarding government employment benefits unless there is statutory entitlement to those benefits.[\[FN21\]](#)

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[\[FN1\] § 5.](#)

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[\[FN2\] § 267.](#)

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[\[FN3\] Metro-Dade Fire Rescue Service Bd. v. Metropolitan Dade County, 819 So. 2d 915 \(Fla. Dist. Ct. App. 3d Dist. 2002\); State v. Hale, 60 Ohio St. 3d 62, 573 N.E.2d 46 \(1991\).](#)

- As to actions by and remedies of public officers and employees to recover compensation, see [§§ 431 et seq.](#)
- As to bribery involving public officials, see [Am. Jur. 2d, Bribery §§ 11 et seq.](#)
- As to compensation of civil servants, generally, see [Am. Jur. 2d, Civil Service § 43.](#)

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[\[FN4\] State ex rel. Leis v. Ferguson, 149 Ohio St. 555, 37 Ohio Op. 268, 80 N.E.2d 118 \(1948\).](#)

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[\[FN5\] Berardocco v. Casey, 45 Pa. Commw. 61, 404 A.2d 780 \(1979\).](#)

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[\[FN6\] State v. Hale, 60 Ohio St. 3d 62, 573 N.E.2d 46 \(1991\).](#)

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[\[FN7\] Alexander v. Stoddard County, 210 S.W.2d 107 \(Mo. 1948\).](#)

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[\[FN8\] § 271.](#)

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[FN9] [Lake County v. State ex rel. Manich, 631 N.E.2d 529 \(Ind. Ct. App. 1994\).](#)

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[FN10] [Dodge v. Board of Education of City of Chicago, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 \(1937\).](#)

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[FN11] [Hinchliffe v. City of San Diego, 165 Cal. App. 3d 722, 211 Cal. Rptr. 560 \(4th Dist. 1985\).](#)

- As to constitutional contractual rights, generally, see [Am. Jur. 2d, Constitutional Law §§ 726 et seq.](#)

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[FN12] [5 U.S.C.A. §§ 4501 to 4523.](#)

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[FN13] [Ridenour v. U.S., 44 Fed. Cl. 202 \(1999\).](#)

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[FN14] [Malinou v. Powers, 114 R.I. 399, 333 A.2d 420 \(1975\).](#)

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[FN15] [Munoz v. City of San Diego, 37 Cal. App. 3d 1, 112 Cal. Rptr. 161 \(4th Dist. 1974\); Malinou v. Powers, 114 R.I. 399, 333 A.2d 420 \(1975\).](#)

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[FN16] [Warner v. Com., 400 S.W.2d 209 \(Ky. 1966\).](#)

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[FN17] [§ 271.](#)

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[FN18] [Metro-Dade Fire Rescue Service Bd. v. Metropolitan Dade County, 819 So. 2d 915 \(Fla. Dist. Ct. App. 3d Dist. 2002\).](#)

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[FN19] [Maxwell v. Daviess County, 190 S.W.3d 606 \(Mo. Ct. App. W.D. 2006\).](#)

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[FN20] [Bonzella v. Monroe Tp., 367 N.J. Super. 581, 844 A.2d 538 \(App. Div. 2004\).](#)

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[FN21] [Bevans v. Office of Personnel Management, 13 Fed. Appx. 997 \(Fed. Cir. 2001\).](#)

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**§ 266. Compensation right as dependent on rendition of public services or performance of duties**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96

It has been said that the right of a public officer to receive compensation can only arise out of the rendition of the public services related to his or her office,[\[FN1\]](#) and that the officer's right to compensation arises out of the performance of his or her duties.[\[FN2\]](#) In this regard, a public officer who is suspended from office may not be entitled to compensation.[\[FN3\]](#) Yet, there is also authority for the view that where the salary of a public officer is considered an incident to his or her office,[\[FN4\]](#) the right to such salary is not necessarily dependent on the services performed.[\[FN5\]](#)

When the services for which compensation is granted are rendered prior to the date on which the terms of compensation are determined, the benefits awarded are not compensation but are a gratuity, and the payment of such benefits violates a state constitutional ban on payment of a gratuity or extra compensation to a public employee; it follows that when the services for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity, and the payment of such benefits does not violate the ban.[\[FN6\]](#)

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[\[FN1\]](#) *Kelty v. State, Dept. of Law and Public Safety, Div. of State Police*, 321 N.J. Super. 84, 728 A.2d 273 (App. Div. 1999); *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

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[\[FN2\]](#) *Opinion of the Justices*, 140 N.H. 297, 666 A.2d 523 (1995).

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[\[FN3\]](#) *Opinion of the Justices*, 140 N.H. 297, 666 A.2d 523 (1995).

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[\[FN4\] § 267.](#)

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[\[FN5\] Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 \(Ct. Cl. 1977\).](#)

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[\[FN6\] City of Omaha v. City of Elkhorn, 276 Neb. 70, 752 N.W.2d 137 \(2008\).](#)

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## **§ 267. Compensation as incident to office**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [94](#), [96](#)

Compensation of public officers is a mere incident to the lawful title or right to the office,[\[FN1\]](#) and belongs to the officer so long as he or she holds the office.[\[FN2\]](#) When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his or her duties, he or she is entitled, during his or her incumbency, to be paid the salary, fees, or emoluments prescribed by law.[\[FN3\]](#) The public body cannot by any direct or indirect course of action deprive such incumbent of the right to receive the emoluments and perquisites

which the law attaches to the office, and effect will not be given to any attempt to deprive him or her of the right thereto, whether it is by unauthorized agreement, by condition, or otherwise,[FN4] or by a wrongful removal or suspension.[FN5]

A public officer holds his office cum onere, and undertakes to perform the duties of the office for the compensation stipulated, whether such duties be increased or diminished; and such compensation must be by virtue of statutory warrant.[FN6]

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[FN1] MacMath v. U.S., 248 U.S. 151, 39 S. Ct. 31, 63 L. Ed. 177 (1918); State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. 1972).

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[FN2] Nicholas v. U.S., 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 (1921); Goodwin v. Carroll County, 250 S.W.3d 427 (Mo. Ct. App. W.D. 2008); Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 (Ct. Cl. 1977).

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[FN3] MacMath v. U.S., 248 U.S. 151, 39 S. Ct. 31, 63 L. Ed. 177 (1918); Wessler v. City of St. Louis, 242 S.W.2d 289 (Mo. Ct. App. 1951); State ex rel. Godby v. Hager, 154 W. Va. 606, 177 S.E.2d 556 (1970).

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[FN4] MacMath v. U.S., 248 U.S. 151, 39 S. Ct. 31, 63 L. Ed. 177 (1918).

- As to agreements affecting official compensation, see § 290.

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[FN5] § 435.

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[FN6] Deloach v. Evans County, 272 Ga. 479, 532 S.E.2d 376 (2000).

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**§ 268. Effect of holding over**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96

A public officer entitled to hold over after the expiration of his or her term until his or her successor qualifies<sup>[FN1]</sup> may be entitled to the compensation of the office during the time in which he or she holds over.<sup>[FN2]</sup> However, there is also authority for the view that an officer holding over is limited in terms of compensation to the term of office, and hence has no right to salary after the term has expired.<sup>[FN3]</sup> Also, where a public officer illegally or wrongfully holds over after his or her term has expired, he or she has no right to the salary or emoluments of the office during such holdover period.<sup>[FN4]</sup>

Even if an officer holds a job and provides services illegally, he or she may retain the quantum meruit value of the services he or she provided.<sup>[FN5]</sup>

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<sup>[FN1]</sup> §§ 147 et seq.

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<sup>[FN2]</sup> [Walker v. Hughes](#), 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 (1944).

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<sup>[FN3]</sup> [State v. Graham](#), 161 Tenn. 557, 30 S.W.2d 274 (1930).

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<sup>[FN4]</sup> [Miller v. Board of Com'rs of Beaver County](#), 1935 OK 429, 171 Okla. 553, 43 P.2d 734 (1935).

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<sup>[FN5]</sup> [Biedenharn v. Hogue](#), 338 Ark. 660, 1 S.W.3d 424 (1999).

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**§ 269. Fixing of compensation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 52](#) (Petition or application—For writ of mandamus—  
To enforce municipal ordinances relating to payment for overtime)

The assignment of compensation to public offices is generally a legislative function,[FN1] as is the fixing of compensation for public employees.[FN2] However, if the office is a constitutional one, the constitution itself may provide the compensation,[FN3] or may entrust the matter to the legislature.[FN4] Furthermore, the legislative authority to fix compensation may be delegated, in some instances, to local authorities or other bodies.[FN5] "Plenary authority" granted by a state constitution to a board of administration for the state public employees' retirement system does not include the exclusive power to set the salaries of its employees.[FN6]

The compensation of the President, the Vice President, and of their immediate employees and administrative assistants is provided for by federal statute.[FN7] Federal and state constitutional and statutory provisions generally provide for the compensation of judges.[FN8]

Where a statute or regulation sets a maximum level of rights or benefits for public employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable.[\[FN9\]](#)

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[\[FN1\] Cochnower v. U.S., 248 U.S. 405, 39 S. Ct. 137, 63 L. Ed. 328 \(1919\)](#), judgment modified, [249 U.S. 588, 39 S. Ct. 387, 63 L. Ed. 790 \(1919\)](#); [State v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583 \(1927\)](#).

- As to compensation of county and municipal officers and employees, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 225 et seq.](#)

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[\[FN2\] Proksa v. Arizona State Schools for the Deaf and the Blind, 205 Ariz. 627, 74 P.3d 939, 179 Ed. Law Rep. 911 \(2003\)](#); [Santa Clara Environmental Health Assn v. County of Santa Clara, 173 Cal. App. 3d 74, 218 Cal. Rptr. 678 \(6th Dist. 1985\)](#).

- As to the amount of compensation of public officers and employees, see [§§ 220 et seq.](#)

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[\[FN3\] Riley v. Carter, 1933 OK 448, 165 Okla. 262, 25 P.2d 666, 88 A.L.R. 1018 \(1933\)](#).

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[\[FN4\] Moore v. Moore, 147 Va. 460, 137 S.E. 488, 51 A.L.R. 1517 \(1927\)](#).

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[\[FN5\] § 270.](#)

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[\[FN6\] Westly v. California Public Employees' Retirement System Bd. of Administration, 105 Cal. App. 4th 1095, 130 Cal. Rptr. 2d 149 \(3d Dist. 2003\)](#), as modified on denial of reh'g, (Feb. 25, 2003).

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[\[FN7\] Am. Jur. 2d, United States § 19.](#)

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[\[FN8\] Am. Jur. 2d, Judges §§ 50 et seq.](#)

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[\[FN9\] Brown v. Township of Old Bridge, 319 N.J. Super. 476, 725 A.2d 1154 \(App. Div. 1999\)](#).

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**§ 270. Fixing of compensation—Delegation of authority**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [94](#), [96](#)

Unless a constitution expressly or impliedly prohibits the legislature from doing so, it may delegate the power to fix compensation to other governmental bodies or officers.<sup>[FN1]</sup> Thus, a state legislature may vest local authorities with authority to fix the compensation for local officers, as, for example where the legislature specifically vests county boards of commissioners with specific authority to fix compensation for all county officers.<sup>[FN2]</sup> The authority to fix compensation of public officers may also be delegated to courts or judges.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Dew v. Ashley County, 199 Ark. 361, 133 S.W.2d 652 \(1939\); Vivian v. Bloom, 115 Colo. 579, 177 P.2d 541 \(1947\).](#)

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<sup>[FN2]</sup> [Leete v. County of Warren, 341 N.C. 116, 462 S.E.2d 476 \(1995\).](#)

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<sup>[FN3]</sup> [Shaw v. Smith County, 29 S.W.2d 1000, 70 A.L.R. 1046 \(Tex. Comm'n App. 1930\).](#)

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**§ 271. Fixing of compensation—Effect of failure to fix compensation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96

If there is no provision of law fixing a salary or compensation for the services connected with a public office, the office may be considered an honorary one.<sup>[FN1]</sup> The absence of any provision for compensation carries with it the implication that the services of the incumbent are gratuitous.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [State ex rel. Jaspers v. West, 13 Wash. 2d 514, 125 P.2d 694 \(1942\).](#)

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<sup>[FN2]</sup> [Darnell v. City of Broken Bow, 139 Neb. 844, 299 N.W. 274, 136 A.L.R. 101 \(1941\); State ex rel. Jaspers v. West, 13 Wash. 2d 514, 125 P.2d 694 \(1942\).](#)

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**§ 272. Method of compensation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 96 to 98, 101.5(1)

The method of paying the compensation of public officers is generally fixed by law.<sup>[FN1]</sup> The compensation of public officers generally takes the form of a salary and is sometimes restricted by constitution or statute to this form of compensation.<sup>[FN2]</sup> However, compensation may also be made on a fee basis and may take the form of perquisites.<sup>[FN3]</sup> Furthermore, the term "emolument"—meaning the profit arising from the office, that which is received as compensation for services or which is annexed to the office as salary, fees, or perquisites<sup>[FN4]</sup>—includes such fees and compensation as the incumbent of the office is by law entitled to receive;<sup>[FN5]</sup> it may import more than "salary" or "fees."<sup>[FN6]</sup>

Fringe benefits, such as the payment of group medical and hospital plans, are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check; such payments for fringe benefits may not constitute "salary," in the strictest sense of the word, but they are compensation.<sup>[FN7]</sup> In this regard, salary, pension, insurance, and similar benefits received by public employees are generally not unconstitutional exclusive emoluments and privileges, but constitute compensation in consideration of services rendered.<sup>[FN8]</sup>

All Federal wage and salary payments must be paid to recipients of such payments by electronic funds transfer, unless another method has been determined by the Secretary of the Treasury to be appropriate.<sup>[FN9]</sup> Each recipient of federal wage or salary payments must designate one or more financial institutions or other authorized payment agents and provide the payment certifying or authorizing agency information necessary for the recipient to receive electronic funds transfer payments through each institution so designated.<sup>[FN10]</sup> Provision made for the waiver of such requirements is provided for upon the written request of the recipient<sup>[FN11]</sup> or by the Secretary of the Treasury for any

group of recipients upon request by the head of an agency under standards prescribed by the Secretary of the Treasury.[\[FN12\]](#)

A foundation's grant of money to a state to fund a health care program does not constitute payment of salaries of governmental officials by a private party.[\[FN13\]](#)

A state statute, allowing a state budget director to withhold any increase in compensation to state managerial and confidential employees provided by the statute when such withholding is necessary to reduce state expenditures to acceptable levels, authorizes the director to deny lump sum merit awards to such employees, notwithstanding a civil service law provision permitting such merit awards, where the statute specifically addressed lump sum merit awards.[\[FN14\]](#)

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[\[FN1\] State of South Dakota v. Collins, 249 U.S. 220, 39 S. Ct. 261, 63 L. Ed. 572 \(1919\).](#)

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[\[FN2\] State of South Dakota v. Collins, 249 U.S. 220, 39 S. Ct. 261, 63 L. Ed. 572 \(1919\).](#)

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[\[FN3\] § 273.](#)

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[\[FN4\] McLean v. U.S., 48 Ct. Cl. 500, 226 U.S. 374, 33 S. Ct. 122, 57 L. Ed. 260 \(1912\); State ex rel. Todd v. Reeves, 196 Wash. 145, 82 P.2d 173, 118 A.L.R. 177 \(1938\).](#)

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[\[FN5\] State ex rel. Todd v. Reeves, 196 Wash. 145, 82 P.2d 173, 118 A.L.R. 177 \(1938\).](#)

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[\[FN6\] Taxpayers' League of Carbon County v. McPherson, 49 Wyo. 251, 54 P.2d 897, 106 A.L.R. 767 \(1936\).](#)

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[\[FN7\] State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 75 Ohio Op. 2d 457, 348 N.E.2d 692 \(1976\).](#)

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[\[FN8\] Leete v. County of Warren, 341 N.C. 116, 462 S.E.2d 476 \(1995\).](#)

- As to insurance, generally, see [Am. Jur. 2d, Insurance §§ 1 et seq.](#)

- As to pensions, generally, see [Am. Jur. 2d, Pensions and Retirement Funds §§ 1 et seq.](#)

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[\[FN9\] 31 U.S.C.A. § 3332\(a\)\(1\).](#)

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[\[FN10\] 31 U.S.C.A. § 3332\(a\)\(2\).](#)

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[\[FN11\] 31 U.S.C.A. § 3332\(b\).](#)

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[\[FN12\]](#) [31 U.S.C.A. § 3332\(c\)](#).

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[\[FN13\]](#) [Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 \(Ky. 1998\)](#).

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[\[FN14\]](#) [Gilligan v. Stone, 20 A.D.3d 697, 799 N.Y.S.2d 600 \(3d Dep't 2005\)](#).

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## **§ 273. Method of compensation—Fees and perquisites**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [94](#), [96](#)

Compensation of public officials is sometimes made by statute on a fee-based system.[\[FN1\]](#) "Fees" are compensation for services rendered by an officer in the progress of a cause.[\[FN2\]](#)

The term "perquisite" when used in connection with a public office means some emolument or profit beyond the salary payable to him or her.[\[FN3\]](#)

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[\[FN1\] City of Livonia v. Clark, 15 Mich. App. 342, 166 N.W.2d 601 \(1968\).](#)

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[\[FN2\] Opinion of the Clerk, 400 So. 2d 406 \(Ala. 1981\).](#)

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[\[FN3\] Taxpayers' League of Carbon County v. McPherson, 49 Wyo. 251, 54 P.2d 897, 106 A.L.R. 767 \(1936\).](#)

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X. Compensation

A. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 274. Compensation of de facto officers, intruders, or usurpers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [94](#), [95](#)

**A.L.R. Library**

[Validity, construction, and application of regulations regarding outside employment of governmental employees or officers,](#)  
[62 A.L.R.5th 671](#)

Generally, a de facto officer is not entitled to the emoluments of office where there is a de jure officer claiming the office.[\[FN1\]](#) Furthermore, a public officer violating a constitutional prohibition on holding two public offices[\[FN2\]](#) was not entitled to the salary and emoluments of the office as to which he was a de facto officer.[\[FN3\]](#)

However, statutes have sometimes provided that any person who has held, de facto, any office or position in the public service and who has performed the duties thereof is entitled to the emoluments and compensation appropriate to such office or position for the time in fact so held.[\[FN4\]](#) The criterion for application of a de facto officer statute is not whether extra pay would be fair and equitable for a particular claimant, but rather whether the public interest is served and the underlying policies are furthered by the conferring of de facto officer status.[\[FN5\]](#) If a person pays a de facto officer the fees allowed by law for his or her services, he or she is protected and will not be compelled to pay them a second time to the officer de jure.[\[FN6\]](#)

A public employee who performs actual services subsequent to the effective date of a forfeiture of employment should not be deprived of compensation for those services.[\[FN7\]](#)

A mere intruder or usurper is not entitled to the salary, fees, and perquisites of the office occupied by him or her, especially when he or she enters into the office by force or fraud, although he or she may in fact exercise the functions of the office.[\[FN8\]](#)

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[\[FN1\]](#) [Butler v. Cocke County, 671 S.W.2d 847 \(Tenn. Ct. App. 1984\).](#)

- As to de facto officers and the de facto officer doctrine, generally, see [§ 23](#).
- As to the validity of acts of de facto officers, see [§§ 236 et seq.](#)

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[\[FN2\]](#) [§ 64.](#)

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[\[FN3\]](#) [Thompson v. Clatskanie Peoples Public Utility Dist., 35 Or. App. 843, 583 P.2d 26 \(1978\).](#)

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[\[FN4\]](#) [In re Police Sergeant \(PM3220S\), Jersey City, 360 N.J. Super. 367, 823 A.2d 84 \(App. Div. 2003\).](#)

- As to recovery of such compensation, see [§§ 438 et seq.](#)

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[\[FN5\]](#) [Rawitz v. County of Essex, 347 N.J. Super. 590, 791 A.2d 314 \(Law Div. 2000\), aff'd, 347 N.J. Super. 570, 791 A.2d 226 \(App. Div. 2002\).](#)

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[\[FN6\]](#) [Hogan v. Garden County, 268 Neb. 631, 686 N.W.2d 356 \(2004\).](#)

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[\[FN7\]](#) [State v. Ercolano, 335 N.J. Super. 236, 762 A.2d 259, 149 Ed. Law Rep. 174 \(App. Div. 2000\).](#)

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[\[FN8\]](#) [Carter v. Thomas, 1935 OK 653, 172 Okla. 558, 46 P.2d 460 \(1935\).](#)

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X. Compensation

B. Amount of Compensation

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## Research References

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [99](#) to [100\(2\)](#)

## Primary Authority

[U.S. Const. Art. II, § 1, cl. 6](#)

[U.S. Const. Amend. XXVII](#)

[2 U.S.C.A. §§ 351 et seq.](#), [357](#), [358](#)

[5 U.S.C.A. §§ 5535, 5536](#)

[28 U.S.C.A. § 1929](#)

[5 C.F.R. §§ 591.201 et seq., 591.301 et seq., 591.401 et seq.](#)

## **A.L.R. Library**

A.L.R. Index, Public Officers and Employees

West's A.L.R. Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#))

## **Forms**

[Am. Jur. Legal Forms 2d §§ 210:19, 210:20](#)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 10, 11, 51, 79](#)

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Public Officers and Employees

X. Compensation  
B. Amount of Compensation  
1. In General

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**§ 275. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

**A.L.R. Library**

[Validity, construction, and application of state family-, parental-, or medical-leave acts, 57 A.L.R.5th 477](#)

Compensation for official services depends entirely upon the law; a public officer may only collect and retain such compensation as is specifically provided by law.<sup>[FN1]</sup> Furthermore, public employees are entitled only to such compensation as is expressly and specifically provided by law<sup>[FN2]</sup> and generally do not have vested or contractual rights to specific rates or levels of compensation.<sup>[FN3]</sup> Administrative boards or officers, in pursuance of the power delegated by the legislature, may fix the compensation of public officers or classes of public officers at any sum or rate which they consider reasonable, within the statutory limitations prescribed by the legislature;<sup>[FN4]</sup> however, salary decisions made by county boards should turn principally on the duties of the job, not on the qualifications of the office holder.<sup>[FN5]</sup> Furthermore, rewarding or penalizing an office holder for his or her conduct is an inappropriate use of the power to set salaries.<sup>[FN6]</sup>

By longstanding practice, salary levels for state employees have been set as a range, defined by the minimum and maximum for the class, with intermediate steps between the extremes. Generally, an employee enters employment at the minimum salary for his or her class and is entitled to annual adjustments to the next higher step within the class until he or she reaches the maximum salary for that class. This practice has legislative sanction in some states.<sup>[FN7]</sup>

The matter of adjusting salary ranges has been considered to be quasi-legislative, so that constitutional due process principles do not entitle public employees to a predeprivation adjudicatory hearing before salary-reduction actions are taken.<sup>[FN8]</sup>

A constitutional provision limiting the amount of compensation to public officers has been held to be restricted to the officers directly named in such provision and designated in the constitution.<sup>[FN9]</sup>

Under federal statutory provisions pertaining to the establishment and operation of a Citizens' Commission on Public Service and Compensation,<sup>[FN10]</sup> such Commission is required to submit to the President a report of the results of a review conducted by the Commission with respect to rates of pay for specified offices and positions, together with its recommendations,<sup>[FN11]</sup> after which the President is required to transmit to Congress his or her recommendations with respect to the exact rates of pay for the offices and positions in question, which the President considers to be fair and reasonable in light of the Commission's report and recommendations, the prevailing market values of the services



rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government.[FN12]

**Practice Tip:** Public officers cannot claim that they are ignorant of the amount of their statutorily mandated compensation, as they have a duty to know the rate of pay they should receive. Those who fail to do so will have that knowledge imputed to them.[FN13]

Because a state statute providing that persons holding supernumerary office are not entitled to salary adjustments was the last expression of the legislative will, its provisions take precedence over an earlier, and less specific, statutory provision governing cost-of-living increases.[FN14] A state statute denying compensation when an official is incarcerated does not show an intent to provide compensation in all other instances.[FN15]

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[FN1] Tirapelle v. Davis, 20 Cal. App. 4th 1317, 26 Cal. Rptr. 2d 666 (3d Dist. 1993).

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[FN2] Power v. U. S., 220 Ct. Cl. 157, 597 F.2d 258 (1979); Longshore v. County of Ventura, 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866 (1979).

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[FN3] Tirapelle v. Davis, 20 Cal. App. 4th 1317, 26 Cal. Rptr. 2d 666 (3d Dist. 1993); Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993).

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[FN4] Dennis v. Rich, 434 S.W.2d 632 (Ky. 1968).

- As to compensation of civil servants, generally, see Am. Jur. 2d, Civil Service § 43.

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[FN5] Stensland v. Faribault County, 365 N.W.2d 224 (Minn. 1985).

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[FN6] Stensland v. Faribault County, 365 N.W.2d 224 (Minn. 1985).

-

[FN7] Tirapelle v. Davis, 20 Cal. App. 4th 1317, 26 Cal. Rptr. 2d 666 (3d Dist. 1993).

-

[FN8] § 431.

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[FN9] Board of Ed. of Graves County v. De Weese, 343 S.W.2d 598 (Ky. 1960).

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[FN10] 2 U.S.C.A. §§ 351 et seq.

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[FN11] 2 U.S.C.A. § 357.

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[\[FN12\] 2 U.S.C.A. § 358\(1\).](#)

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[\[FN13\] State v. Hale, 60 Ohio St. 3d 62, 573 N.E.2d 46 \(1991\).](#)

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[\[FN14\] Cleburne County Com'n v. Norton, 979 So. 2d 766 \(Ala. 2007\).](#)

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[\[FN15\] Hogan v. Garden County, 268 Neb. 631, 686 N.W.2d 356 \(2004\).](#)

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X. Compensation  
B. Amount of Compensation  
1. In General

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## **§ 276. Comparative pay of public employees; validity of statute setting maximum salary**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

It does not violate the principle of pay equity for a state to pay employees within the same classification differing amounts.[\[FN1\]](#) However, state constitutional provisions have sometimes provided that state employees performing

"like" or similar services must be compensated according to the same standards, and have, thus, prohibited preferential compensation treatment for persons equally qualified who performed substantially similar services.[FN2] Furthermore, the Federal Equal Pay Act, which prohibits discrimination in compensation on the basis of sex,[FN3] applies to state and local government employees.[FN4]

Under an "equal pay for equal work" provision of a county ordinance establishing a county's personnel system, the county has a mandatory duty to provide equal pay for equal work with respect to county employees who work 40 hours per week yet receive the same compensation as employees who work 35 hours per week.[FN5]

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[FN1] [Largent v. West Virginia Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 \(1994\).](#)

- As to compensation of civil servants, generally, see [Am. Jur. 2d, Civil Service § 43.](#)

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[FN2] [Dempsey v. Romer, 825 P.2d 44 \(Colo. 1992\).](#)

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[FN3] [29 U.S.C.A. § 206\(d\)](#), as discussed, generally, in [Am. Jur. 2d, Job Discrimination § 20.](#)

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[FN4] [Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 \(1985\); Largent v. West Virginia Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 \(1994\).](#)

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[FN5] [Roberts v. King County, 107 Wash. App. 806, 27 P.3d 1267 \(Div. 1 2001\).](#)

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**§ 277. Compensation of public employees as compared to private employees**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 51](#) (Petition or application—For writ of mandamus—To compel adoption of wage scale in conformity with prevailing wages—To recover retroactive wage payments).

Some states have enacted what have been referred to as "prevailing wage" provisions; the legislative policy underlying a "prevailing wage" doctrine is to insure that public employees performing services substantially similar to those performed by employees in private industry will be paid substantially equal wages, so that competent and qualified persons will be attracted to government service.<sup>[FN1]</sup> Prevailing wage provisions set forth in a county charter constitute a positive limitation on the governing body's discretionary power to determine the rate of compensation.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Melendres v. City of Los Angeles](#), 40 Cal. App. 3d 718, 115 Cal. Rptr. 409 (2d Dist. 1974).

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<sup>[FN2]</sup> [Santa Clara Environmental Health Assn v. County of Santa Clara](#), 173 Cal. App. 3d 74, 218 Cal. Rptr. 678 (6th Dist. 1985).

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1. In General

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**§ 278. Extra compensation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to 100(2)

A person who accepts a public office is generally obliged to look solely to the law fixing compensation for such office for his or her compensation, and cannot seek additional remuneration for doing what the law requires him or her to do.<sup>[FN1]</sup> The fact that the duties of the office are increased does not alter this rule; generally, in the absence of legislation to the contrary, if, by statute or ordinance, the duties of an officer are increased by the addition of other duties germane to his or her office, he or she must perform them without extra compensation.<sup>[FN2]</sup> However, in some states, a constitutional prohibition against midterm increases in compensation of governmental officials is not absolute, and an exception exists where additional duties, extrinsic or not germane to the office, have been imposed in conjunction with the increase in compensation.<sup>[FN3]</sup>

There is some authority for the view that a government employee who works in excess of his or her usual day cannot recover for the overtime work in the absence of an express agreement.<sup>[FN4]</sup> However, there is authority to the effect that a state employee was entitled to overtime compensation under a state statute.<sup>[FN5]</sup>

Payment of compensation to a public servant constitutes extra compensation whenever there is no legal obligation to pay such compensation.<sup>[FN6]</sup>

A revenue-enhancement compensation for a hospital administrator is a bonus payment which is prohibited by a state constitution where the compensation is not based upon services provided only by the administrator, but is based upon the performance of other individuals in the entire hospital.<sup>[FN7]</sup> State corrections officers do not have a contractual property right in receiving additional pay for amassing education credits, based on a percentage of pay, and thus their takings clause claim is precluded when the legislature changed the method of compensation to a flat rate.<sup>[FN8]</sup>

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[\[FN1\] Polk Tp., Sullivan County v. Spencer, 364 Mo. 97, 259 S.W.2d 804 \(1953\).](#)

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[\[FN2\] Woodwell v. U.S., 44 Ct. Cl. 597, 214 U.S. 82, 29 S. Ct. 576, 53 L. Ed. 919 \(1909\); Botti v. Lippman, 290 A.D.2d 923, 736 N.Y.S.2d 807 \(3d Dep't 2002\); State ex rel. Edmondson v. Oklahoma Corp. Com'n, 1998 OK 118, 971 P.2d 868 \(Okla. 1998\), as corrected, \(Dec. 10, 1998\).](#)

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[\[FN3\] Laclede County. v. Douglass, 43 S.W.3d 826 \(Mo. 2001\).](#)

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[\[FN4\] Theune v. City of Sheboygan, 57 Wis. 2d 417, 204 N.W.2d 470 \(1973\).](#)

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[\[FN5\] Young v. State, 340 Or. 401, 133 P.3d 915 \(2006\).](#)

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[\[FN6\] Myers v. Nebraska Equal Opportunity Com'n, 255 Neb. 156, 582 N.W.2d 362 \(1998\).](#)

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[\[FN7\] Varnado v. Hospital Service Dist. No. 1 of Parish of Assumption, State of La., 730 So. 2d 1066 \(La. Ct. App. 1st Cir. 1999\).](#)

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[\[FN8\] Rhode Island Broth. of Correctional Officers v. Rhode Island, 264 F. Supp. 2d 87 \(D.R.I. 2003\), aff'd, 357 F.3d 42 \(1st Cir. 2004\).](#)

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**§ 279. Extra compensation—Federal officers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

A federal statute specifically prohibits an officer from receiving pay in addition to the pay for his or her regular office for performing the duties of a vacant office as specified by statute.<sup>[FN1]</sup> Furthermore, under the statute, an employee may not receive additional pay or allowances for performing the duties of another employee,<sup>[FN2]</sup> or pay in addition to the regular pay received for employment held before his or her appointment or designation as acting for or instead of an occupant of another position or employment.<sup>[FN3]</sup> Furthermore, a federal employee whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law, and the appropriation therefor specifically states that it is for the additional pay or allowance.<sup>[FN4]</sup>

A federal employee is entitled to receive only the salary of the position to which he or she was appointed, even if he or she has performed the duties of a higher graded position.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [5 U.S.C.A. § 5535\(a\)](#).

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<sup>[FN2]</sup> [5 U.S.C.A. § 5535\(b\)\(1\)](#).

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<sup>[FN3]</sup> [5 U.S.C.A. § 5535\(b\)\(2\)](#).

- As to bribery involving public officials, generally, see [Am. Jur. 2d, Bribery §§ 11 et seq.](#)

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<sup>[FN4]</sup> [5 U.S.C.A. § 5536](#).

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<sup>[FN5]</sup> [Collier v. U.S., 56 Fed. Cl. 354 \(2003\)](#), aff'd, [379 F.3d 1330 \(Fed. Cir. 2004\)](#).

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X. Compensation

B. Amount of Compensation

1. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 280. Compensation from two or more offices or government agencies**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

State constitutional provisions have sometimes prohibited certain elected officers from receiving compensation for services from any other governmental agency.<sup>[FN1]</sup> Constitutional provisions may also prohibit an officer who holds one position from receiving compensation from another office which the officer holds at the same time.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Mountain States Ins. Co. v. State, By and Through Bd. of Hail Ins., Dept. of Agriculture, 218 Mont. 365, 708 P.2d 564 \(1985\).](#)

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<sup>[FN2]</sup> [Boyett v. Calvert, 467 S.W.2d 205 \(Tex. Civ. App. Austin 1971\)](#), writ refused n.r.e., (Oct. 20, 1971).

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B. Amount of Compensation

2. Expenses and Allowances

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## § 281. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 99 to 100(2)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 11](#) (Complaint, petition, or declaration—Allegation—Defendant public officer's wrongful claims for expenses incurred in private business or practice)

In the absence of constitutional restriction, an officer may be allowed repayment of the expenses actually incurred by him or her in the performance of his or her official duties.<sup>[FN1]</sup>

Compensation for the expenses of the President, the Vice President, and their immediate employees and administrative assistants is provided for by statute.<sup>[FN2]</sup> Furthermore, where the ministerial officers of the United States incur extraordinary expense in executing Acts of Congress, the payment of which is not specifically provided for, the Attorney General may allow the payment thereof.<sup>[FN3]</sup>

State and federal employees who are hired to perform construction work in sparsely populated and undeveloped areas of western Alaska, are not entitled to per diem compensation, where each worksite to which an employee is assigned is designated as that employee's permanent duty station.<sup>[FN4]</sup> However, a federal employee's allegations that

she was not paid a foreign post allowance to which she was entitled pursuant to a Department of State Standardized Regulation to compensate for a higher cost of living at a foreign work station states a claim for which relief could be granted.[FN5]

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[FN1] [Schanke v. Mendon, 250 Iowa 303, 93 N.W.2d 749 \(1958\).](#)

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[FN2] [Am. Jur. 2d, United States § 19.](#)

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[FN3] [28 U.S.C.A. § 1929.](#)

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[FN4] [Agwiak v. U.S., 347 F.3d 1375 \(Fed. Cir. 2003\).](#)

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[FN5] [Adde v. U.S., 81 Fed. Cl. 415 \(2008\).](#)

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B. Amount of Compensation  
2. Expenses and Allowances

[Topic Summary](#) [Correlation Table](#) [References](#)

## § 282. Mileage or traveling expenses

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

### Forms

[Am. Jur. Legal Forms 2d § 210:20](#) (Reimbursement for travel)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 79](#) (Complaint, petition, or declaration—Against county officer and sureties—To recover money paid officer on improper expense claims)

In addition to their fixed compensation, public officers may be allowed mileage where they are required to travel in the discharge of their official duties.[\[FN1\]](#)

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[\[FN1\] State ex rel. Lyons v. Guy, 107 N.W.2d 211 \(N.D. 1961\); Gordon v. Conner, 1938 OK 384, 183 Okla. 82, 80 P.2d 322, 118 A.L.R. 783 \(1938\).](#)

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## Public Officers and Employees

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### X. Compensation

#### B. Amount of Compensation

##### 2. Expenses and Allowances

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### § 283. Effect of constitutional provisions fixing or limiting salaries of officers

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

#### A.L.R. Library

[Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182](#)

There is a conflict of authority as to whether constitutional provisions fixing or limiting the salary or compensation of a public officer preclude the allowance of expenses or disbursements.<sup>[FN1]</sup> While allowances for expenses of public officers have been considered proper in some instances,<sup>[FN2]</sup> but not in others,<sup>[FN3]</sup> the courts have sometimes made a distinction between official expenses and personal expenses, such that the legislature is generally said to have the power to appropriate public funds for the official expenses of all departments of the state government.<sup>[FN4]</sup>

The conflict arises with regard to the question whether the legislature has the power to allow personal expenses, where the constitution contains a provision fixing or limiting the salary or compensation of a public officer.<sup>[FN5]</sup> Constitutional provisions fixing or limiting salaries of public officers have sometimes been held, in the particular situations involved, not to preclude an allowance to such officers for personal expenses or disbursements.<sup>[FN6]</sup> Personal expenses have been allowed in some instances upon the grounds that a constitutional provision fixing the salary or compensation of an officer without an express limitation does not preclude the allowance of expenses,<sup>[FN7]</sup> and that the enumeration in a constitutional provision of salary or per diem, and mileage does not impliedly limit personal expenses to the mileage allowed.<sup>[FN8]</sup>

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<sup>[FN1]</sup> [Geyso v. City of Cudahy, 34 Wis. 2d 476, 149 N.W.2d 611 \(1967\).](#)

- As to the fixing of compensation of public officers or employees, generally, see [§ 269](#).

- As to a discussion of the validity of a statute setting a maximum salary limit on state employees, see [§ 276](#).

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<sup>[FN2]</sup> [Ex parte Alabama Senate, 466 So. 2d 914 \(Ala. 1985\); Spearman v. Williams, 1966 OK 33, 415 P.2d 597 \(Okla. 1966\); In re Advisory Opinion to House of Representatives, 485 A.2d 550 \(R.I. 1984\).](#)

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[\[FN3\] Gipson v. Maner, 225 Ark. 976, 287 S.W.2d 467 \(1956\); State ex rel. Barker v. Harmon, 882 S.W.2d 352 \(Tenn. 1994\).](#)

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[\[FN4\] Spearman v. Williams, 1966 OK 33, 415 P.2d 597 \(Okla. 1966\).](#)

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[\[FN5\] Spearman v. Williams, 1966 OK 33, 415 P.2d 597 \(Okla. 1966\).](#)

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[\[FN6\] Van Hart v. deGraffenried, 388 So. 2d 1196 \(Ala. 1980\); Jones v. Mears, 256 Ark. 825, 510 S.W.2d 857 \(1974\).](#)

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[\[FN7\] Collins v. Riley, 24 Cal. 2d 912, 152 P.2d 169 \(1944\).](#)

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[\[FN8\] Earhart v. Frohmiller, 65 Ariz. 221, 178 P.2d 436 \(1947\).](#)

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**§ 284. Effect of constitutional restrictions on power to change compensation**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

The courts have been called upon to determine whether the constitutional restrictions upon the power of the legislature or other public body to change the compensation of public officers during their terms of office, or other like constitutional prohibitions,[\[FN1\]](#) apply to allowances made for expenses or disbursements. Generally, statutory compensation to a public officer for expenses necessarily incurred in performing the duties of his or her office is not within a prohibition against increasing or otherwise changing his or her compensation during his or her term of office,[\[FN2\]](#) or against payment to him or her of any fees or perquisites in addition to his or her salary,[\[FN3\]](#) or against withholding any portion of the officer's salary.[\[FN4\]](#) Yet, it has sometimes been said that to sustain an appropriation in gross as an allowance for expenses rather than as a forbidden increase of compensation, the appropriation must be within such reasonable limits as to warrant the conclusion that it might be covered by a certified statement of expenses incurred.[\[FN5\]](#)

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[\[FN1\]](#) As to such restrictions, generally, see §§ [287](#) to [289](#).

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[\[FN2\]](#) [Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577, 5 A.L.R.2d 1154 \(1948\); Geyso v. City of Cudahy, 34 Wis. 2d 476, 149 N.W.2d 611 \(1967\).](#)

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[\[FN3\]](#) [Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577, 5 A.L.R.2d 1154 \(1948\).](#)

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[\[FN4\]](#) [Smith v. Jackson, 246 U.S. 388, 38 S. Ct. 353, 62 L. Ed. 788 \(1918\); Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577, 5 A.L.R.2d 1154 \(1948\).](#)

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[\[FN5\]](#) [Appeals of Loushay, 169 Pa. Super. 543, 83 A.2d 408 \(1951\), judgment aff'd, 370 Pa. 453, 88 A.2d 793 \(1952\); Peay v. Nolan, 157 Tenn. 222, 7 S.W.2d 815, 60 A.L.R. 408 \(1928\).](#)

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**§ 285. Generally**

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[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 10](#) (Complaint, petition, or declaration—Taxpayers' action—Against county and its officer—To enjoin payment of increase in compensation to public officer—To recover increased compensation paid)

The legislative or other body which creates a public office has the power, except as otherwise prohibited by some constitutional provision,[[FN1](#)] to alter the compensation for such office whenever it may choose to do so.[[FN2](#)] Compensation and salaries of public employees may be modified or reduced by the proper statutory authority,[[FN3](#)] and statutes or regulations may give an appointing authority the discretion to award a salary increase to an employee, rather than to an entire grade or class.[[FN4](#)] Furthermore, a constitution, in providing the salary or emoluments of particular offices, may empower the legislature to change the salary or emoluments,[[FN5](#)] provided the changes are not made during the officers' terms of office.[[FN6](#)] Generally, the right of an officer to compensation, until it is earned, does not spring from contract.[[FN7](#)]

**Observation:** Federal regulations provide for cost-of-living allowances and differentials for certain federal employees based on their location to perform their duties in specified geographical areas.[[FN8](#)]

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[\[FN1\] § 287.](#)

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[\[FN2\] Dodge v. Board of Education of City of Chicago, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57 \(1937\); Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 \(Ct. Cl. 1977\).](#)

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[\[FN3\] Tirapelle v. Davis, 20 Cal. App. 4th 1317, 26 Cal. Rptr. 2d 666 \(3d Dist. 1993\).](#)

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[\[FN4\] Aubrey v. Office of Attorney General, 994 S.W.2d 516 \(Ky. Ct. App. 1998\).](#)

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[\[FN5\] State ex rel. Miller v. Lani, 55 Nev. 123, 27 P.2d 537 \(1933\).](#)

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[\[FN6\] § 287.](#)

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[\[FN7\] §§ 266, 287.](#)

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[\[FN8\] 5 C.F.R. §§ 591.201 et seq., 591.301 et seq., 591.401 et seq.](#)

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**§ 286. Effect of acceptance of employment or rendering of services under existing compensation rate**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

In some jurisdictions, elements of compensation for an elected officer become contractually vested upon acceptance of employment, and salaries of elected state officers may not be reduced during their term of office.<sup>[FN1]</sup> After services have been rendered by a public officer under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate;<sup>[FN2]</sup> the employee's rights are set by the law applicable at the time compensable services are rendered.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Thorning v. Hollister School Dist.](#), 11 Cal. App. 4th 1598, 15 Cal. Rptr. 2d 91, 79 Ed. Law Rep. 916 (6th Dist. 1992).

- As to constitutional restrictions against changing compensation of public officers or employees, see §§ [287](#) to [289](#).

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<sup>[FN2]</sup> [State of Mississippi, for Use of Robertson v. Miller](#), 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517 (1928).

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<sup>[FN3]</sup> [Longshore v. County of Ventura](#), 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866 (1979).

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§ 287. Constitutional restrictions

West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 99 to 100(2)

The general power of the legislature or other public body to alter the compensation of public officers is sometimes limited by constitutional restrictions against changing the compensation of public officers or certain named officers during their existing terms.<sup>[FN1]</sup> All candidates, both incumbents and challengers, must be on notice of what the salary is for the office for which they are running, and it is not appropriate under a state constitution that the salary be increased after the election is concluded, so as to apply to newly elected officials, whether they be incumbents or newly elected individuals.<sup>[FN2]</sup> Under the United States Constitution, Congress is prohibited from changing the President's compensation during the period for which he or she is elected,<sup>[FN3]</sup> and no law varying the compensation of members of Congress may take effect until an election of members of the House of Representatives shall have intervened.<sup>[FN4]</sup>

Judges of inferior courts, as well as other government officials who may perform adjudicatory functions, do not enjoy constitutional protection against diminishment of their compensation during their continuance in office; only the justices of the state Supreme Court enjoyed such constitutional protection.<sup>[FN5]</sup>

Constitutional and statutory provisions prohibiting mid-term salary increases for elected public officials, while allowing increases for newly elected officials, do not violate equal protection guarantees, where the provisions are rationally related to governmental interests in ensuring the integrity and independence of government officials.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Lee v. State Bd. of Pension Trustees](#), 739 A.2d 336 (Del. 1999); [Dudley v. Rowland](#), 271 Ga. 176, 517 S.E.2d 326 (1999); [Wallace v. King](#), 973 S.W.2d 485 (Ky. Ct. App. 1998); [State ex rel. Haragan v. Harris](#), 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173 (1998).

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<sup>[FN2]</sup> [Allen v. McClendon](#), 967 S.W.2d 1 (Ky. 1998).

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<sup>[FN3]</sup> [U.S. Const. Art. II, § 1, cl. 6](#).

- As to the compensation of the President, generally, see [Am. Jur. 2d, United States § 19](#).

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<sup>[FN4]</sup> [U.S. Const. Amend. XXVII](#).

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[\[FN5\] Pellegrino v. Rhode Island Ethics Com'n, 788 A.2d 1119 \(R.I. 2002\).](#)

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[\[FN6\] Presley v. Board of County Com'rs of Oklahoma County, 1999 OK 45, 981 P.2d 309 \(Okla. 1999\).](#)

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## **§ 288. Constitutional restrictions—Purpose of restrictions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [99](#) to [100\(2\)](#)

The purpose of constitutional provisions against changing the compensation of a public officer during his or her term or incumbency is to establish definiteness and certainty as to the salary pertaining to the office, and to take from the applicable public bodies the power to gratuitously compensate such officers in addition to that compensation established by law.[\[FN1\]](#) The prohibition against modifying an elected public officer's salary during his or her term of office has also been stated as being intended to deter the appropriative body from influencing a public officer by threat or promise of salary change and to discourage the officer from seeking increased compensation.[\[FN2\]](#)

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[FN1] [Cook v. Chilton By and For Bd. of Trustees of County Emp. Retirement System, 390 S.W.2d 656 \(Ky. 1965\)](#); [Riley v. Carter, 1933 OK 448, 165 Okla. 262, 25 P.2d 666, 88 A.L.R. 1018 \(1933\)](#).

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[FN2] [Tisdel v. Board of County Com'rs of Bent County, 621 P.2d 1357 \(Colo. 1980\)](#).

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## **§ 289. Constitutional restrictions—Acts or measures violative of restrictions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 99 to [100\(2\)](#)

A constitutional prohibition against changes in compensation of public officers is inexorable; it cannot be evaded, either directly or indirectly, by the legislature or other body.[FN1] Thus, under a constitutional provision providing that no change in compensation of officers voted by the legislature could affect the salary of any officer during his or her

existing term, a public officer was not entitled to an increase in remuneration authorized by a statute providing for such increase, which statute was adopted during the officer's term of office.<sup>[FN2]</sup> A constitutional protection against reduction in an elected public official's salary "during the term for which he is elected" begins when the official qualifies and is elected to office, and thus, a parish police jury could not pass a resolution, after justices of the peace, constables, and district attorney were elected, to reduce their pay effective on the date the new terms of office were to begin.<sup>[FN3]</sup> A county's board of commissioners violated the state constitution and statutory mandates by reducing a full-time chief magistrate's compensation during the term for which he was elected, where although the statute allowed the county to supplement the minimum annual salary, it did not similarly provide an avenue for the county to impose a salary decrease below the statutory minimum.<sup>[FN4]</sup>

If new duties germane to the office are imposed upon the incumbent, he or she must perform them without extra compensation,<sup>[FN5]</sup> and where additional compensation is provided by statute or ordinance for such new duties, there is a violation of the constitutional prohibition against increase of compensation.<sup>[FN6]</sup> Yet, where new duties are delegated by statute to a public officer which duties are outside the scope or range of his or her office, and additional compensation is provided therefor, no unconstitutional change of salary results.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [Bakes v. Snyder, 486 Pa. 80, 403 A.2d 1307 \(1979\)](#); [Schultz v. Milwaukee County, 250 Wis. 18, 26 N.W.2d 260 \(1947\)](#).

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<sup>[FN2]</sup> [State ex rel. Artmeyer v. Board of Trustees of Delhi Tp., 43 Ohio St. 2d 62, 72 Ohio Op. 2d 35, 330 N.E.2d 684 \(1975\)](#).

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<sup>[FN3]</sup> [Avoyelles Parish Justice of the Peace v. Avoyelles Parish Police Jury, 758 So. 2d 161 \(La. Ct. App. 3d Cir. 1999\)](#), as amended on reh'g, (Oct. 27, 1999) and writ denied, [754 So. 2d 217 \(La. 1999\)](#).

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<sup>[FN4]</sup> [Dudley v. Rowland, 271 Ga. 176, 517 S.E.2d 326 \(1999\)](#).

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<sup>[FN5]</sup> [§ 278](#).

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<sup>[FN6]</sup> [State ex rel. Goodwin v. Rogers, 158 W. Va. 1041, 217 S.E.2d 65 \(1975\)](#).

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<sup>[FN7]</sup> [State ex rel. Goodwin v. Rogers, 158 W. Va. 1041, 217 S.E.2d 65 \(1975\)](#).

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[5 U.S.C.A. §§ 5561 et seq.](#)

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## § 290. Agreements as to compensation

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [95](#), [101](#)

The courts, with some exceptions,[[FN1](#)] declare invalid as against public policy a contract or agreement by a public officer to render services for a different compensation than that provided by law,[[FN2](#)] as, for example, where the stipulated compensation is less than that provided for by law.[[FN3](#)] Agreements of this character have been held invalid where made by a public officer with another officer or public body.[[FN4](#)] In this regard, an agreement by a candidate for office that if chosen he or she will discharge the duties of the office without compensation or for a lesser compensation than that provided by law,[[FN5](#)] or will pay part of his or her salary into the public treasury,[[FN6](#)] is illegal, regardless of whether made in good faith.[[FN7](#)]

Public policy generally forbids assignments of the salary or fees of a public officer before they are earned.[[FN8](#)]

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[FN1] [Hodges v. Daviess County, 285 Ky. 508, 148 S.W.2d 697 \(1941\)](#), holding the rule inapplicable to deputies of public officers who hold office at the pleasure of the appointing power and who may be removed at any time.

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[FN2] [Fennell v. School Dist. No. 13, 208 Ark. 620, 187 S.W.2d 187 \(1945\)](#); [Allen v. City of Lawrence, 318 Mass. 210, 61 N.E.2d 133, 160 A.L.R. 486 \(1945\)](#).

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[FN3] [Bardens v. Board of Trustees of Judges Retirement System, 22 Ill. 2d 56, 174 N.E.2d 168 \(1961\)](#); [Lemper v. City of Dubuque, 237 Iowa 1109, 24 N.W.2d 470 \(1946\)](#).

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[FN4] [Peterson v. City of Parsons, 139 Kan. 701, 33 P.2d 715 \(1934\)](#); [State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W.2d 532 \(1940\)](#).

- As to recovery by public officers or employees of compensation where agreements for compensation less than that required by law have been found invalid, see [§ 434](#).

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[FN5] [Sparks v. Boggs, 339 S.W.2d 480 \(Ky. 1960\)](#); [Tipton v. Sands, 103 Mont. 1, 60 P.2d 662, 106 A.L.R. 474 \(1936\)](#).

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[FN6] [Sparks v. Boggs, 339 S.W.2d 480 \(Ky. 1960\)](#).

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[FN7] [Sparks v. Boggs, 339 S.W.2d 480 \(Ky. 1960\)](#).

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[FN8] [Am. Jur. 2d, Assignments § 69](#).

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**§ 291. Absence from office; failure to discharge duties**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 95, 101

The intent of constitutional provisions in some states has been said to be that no public officer may receive the emoluments of his or her office while absent therefrom, not temporarily, but for an extended period.<sup>[FN1]</sup> The Missing Persons Act provides for payments to federal employees who are in a missing status.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Whitworth v. Miller, 302 Ky. 24, 193 S.W.2d 470 \(1946\).](#)

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<sup>[FN2]</sup> [5 U.S.C.A. §§ 5561 et seq.](#)

- As to the validity and construction of state statutes requiring employers to compensate employees for absences occasioned by military service, see [Am. Jur. 2d, Military and Civil Defense § 150](#).
- As to payment under the Missing Persons Act to members of the federal uniformed services who are in a missing status, see [Am. Jur. 2d, Military and Civil Defense § 154](#).

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**§ 292. Termination or separation from employment; removal**

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[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 49](#) (Complaint, petition or declaration—By public employee—For salary withheld after illegal discharge)

In general, a public employee whose employment has terminated may not recover the monetary value of unused vacation and sick time in the absence of statutory or contractual authority.<sup>[FN1]</sup> The terms of employment concerning the payment of unused fringe benefits to public employees must be express and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment.<sup>[FN2]</sup> A court will construe any ambiguity in the terms of employment concerning the payment of unused fringe benefits to public employees in favor of the employees.<sup>[FN3]</sup> There is no state common law requiring good standing as a pre-condition to a government employee's receiving accrued benefits at separation.<sup>[FN4]</sup>

Pursuant to state statute, a public employee is entitled to be compensated by the employing entity until the employing entity has conducted a pretermination hearing and made a decision to terminate the employee.<sup>[FN5]</sup>

A person elected to a public office ordinarily has no vested prospective right that prevents a legislative branch, or other proper authority, from abolishing the office, reducing the term of office or reducing the rate of compensation for

the office; however, there is a vested right for compensation after services have been performed by a public officer pursuant to a legislatively fixed compensation schedule.[FN6]

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[FN1] [Kerlikowske v. City of Buffalo, 305 A.D.2d 997, 758 N.Y.S.2d 739 \(4th Dep't 2003\)](#).

- As to actions for recovery of compensation by public officers and employees, generally, see [§§ 433 et seq.](#)

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[FN2] [Howell v. City of Princeton, 210 W. Va. 735, 559 S.E.2d 424 \(2001\)](#).

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[FN3] [Howell v. City of Princeton, 210 W. Va. 735, 559 S.E.2d 424 \(2001\)](#).

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[FN4] [Nabors v. Miami-Dade County, 796 So. 2d 634 \(Fla. Dist. Ct. App. 3d Dist. 2001\)](#).

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[FN5] [Perine v. Kennedy, 868 So. 2d 1123, 187 Ed. Law Rep. 366 \(Ala. Civ. App. 2003\)](#).

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[FN6] [Hoag v. State ex rel. Kennedy, 836 So. 2d 207 \(La. Ct. App. 1st Cir. 2002\)](#), writ denied, [840 So. 2d 570 \(La. 2003\)](#).

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**§ 293. Termination or separation from employment; removal—Abandonment of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [95](#), [101](#)

Where the acts or conduct of a public officer are such as to show clearly an intention upon his or her part to relinquish or abandon the office<sup>[FN1]</sup> before the end of the term, he or she is ordinarily not entitled to compensation for the remainder of the term.<sup>[FN2]</sup>

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<sup>[FN1]</sup> §§ [159](#), [160](#).

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<sup>[FN2]</sup> [Jones v. Town of Wayland, 374 Mass. 249, 373 N.E.2d 199 \(1978\)](#); [Hirschberg v. City of New York, 294 N.Y. 55, 60 N.E.2d 539 \(1945\)](#).

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**§ 294. Payment to de facto officer**

**West's Key Number Digest**

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[Payment of salary to de facto officer or employee as defense to action or proceeding by de jure officer or employee for salary, 64 A.L.R.2d 1375](#)

The view has been followed in some instances that the payment of a salary to a de facto officer while the de jure officer was wrongfully excluded from office does not impair the right of the officer de jure to recover his or her salary or compensation from the city, county, or other public body charged with the duty of paying it.<sup>[FN1]</sup> In this regard, an elected official who assumes office after a contested election is entitled to compensation as if he or she had served from the statutory commencement of his or her elected term, even where another individual has received compensation for rendering the service for the period of time in question. The reason for this is that the right of the holder of the office to receive the compensation annexed to the office is legislative or constitutional, as the case may be, and not contractual, so that the salary belongs to the officer de jure regardless of whether he or she or a de facto officer discharged the responsibilities of the office during the disputed period.<sup>[FN2]</sup>

Other decisions support the proposition that a state or municipality which has paid to a de facto officer the salary of the office is not liable to the de jure officer for such salary,<sup>[FN3]</sup> even though the de jure officer may be in the civil service.<sup>[FN4]</sup> Two reasons assigned by the courts in support of the rule that payment to a de facto officer is a bar to the right of a de jure officer to the salary given are that a governmental body ought not to be compelled to pay twice for the performance of one service,<sup>[FN5]</sup> and a government body should be able to rely on a de facto officer's apparent title when making payment for services rendered.<sup>[FN6]</sup>

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<sup>[FN1]</sup> § 436.

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<sup>[FN2]</sup> [Reed v. Sloan](#), 475 Pa. 570, 381 A.2d 421 (1977).

- As to de facto officers, generally, see [§§ 23 et seq.](#)

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<sup>[FN3]</sup> [People ex rel. Hilger v. Myers](#), 114 Ill. App. 2d 478, 252 N.E.2d 924 (1st Dist. 1969); [Glenn v. Chambers](#), 244 Iowa 750, 56 N.W.2d 892 (1953); [Hogan v. Garden County](#), 268 Neb. 631, 686 N.W.2d 356 (2004).

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[\[FN4\] State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S.W.2d 357, 59 A.L.R. 95 \(1928\); Mullane v. McKenzie, 269 N.Y. 369, 199 N.E. 624, 103 A.L.R. 758 \(1936\).](#)

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[\[FN5\] McCollister v. Police Jury of Sabine Parish, 197 So. 303 \(La. Ct. App. 2d Cir. 1940\); Hogan v. Garden County, 268 Neb. 631, 686 N.W.2d 356 \(2004\); State ex rel. Cox v. Hooper, 137 Ohio St. 222, 18 Ohio Op. 9, 28 N.E.2d 598 \(1940\).](#)

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[\[FN6\] Hogan v. Garden County, 268 Neb. 631, 686 N.W.2d 356 \(2004\).](#)

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XI. Liability

A. Civil Liability

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [111](#), [113](#) to [119](#), [123](#) to [143](#)

West's Key Number Digest, [United States](#) [10\(4\)](#)

## **Primary Authority**

[U.S. Const. Art. I, § 6, cl. 1](#); [U.S. Const. Amend. XI](#)

[5 U.S.C.A. App. 4 §§ 102, 104](#)

[18 U.S.C.A. §§ 203 to 209, 216\(b\), 3666](#)

[28 U.S.C.A. §§ 2042, 2674, 2679, 2680](#)

[31 U.S.C.A. § 9302](#)

[42 U.S.C.A. § 1983](#)

## **A.L.R. Library**

A.L.R. Index, Civil Rights and Discrimination

A.L.R. Index, Discharge from Employment or Office

A.L.R. Index, Governmental Immunity or Privilege, Libel and Slander

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### **Trial Strategy**

[Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291](#)

### **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 72, 74, 77 to 79, 82 to 87, 89](#)

### **Model Codes and Restatements**

[Restatement Second, Torts § 895D](#)

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63C Am. Jur. 2d Public Officers and Employees § 295



## Public Officers and Employees

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., Eric C. Surette, J.D., Barbara J. Van Arsdale, J.D.

### XI. Liability

#### A. Civil Liability

##### 1. Liability of Public Officers

###### a. In General

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### § 295. Generally

#### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Official immunity shields public employees against lawsuits alleging common law torts, such as negligence.<sup>[FN1]</sup> It is an affirmative defense that shields governmental employees from personal liability so that they are encouraged to vigorously perform their official duties. A governmental employee is entitled to official immunity for the performance of discretionary duties that are within the scope of the employee's authority, provided that the employee acts in good faith. Official immunity is designed to protect public officials from being forced to defend their decisions that were reasonable when made, but upon which hindsight has cast a negative light.<sup>[FN2]</sup>

In determining the scope of a public official's authority, and whether the act complained of was beyond that scope, for purposes of qualified official immunity,<sup>[FN3]</sup> the issue is not whether the official properly exercised discretionary duties or whether the official violated the law; immunity shields a public officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances confronted.<sup>[FN4]</sup> The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known.<sup>[FN5]</sup> Thus, certain types of conduct by public officers or employees, such as intentional torts, have been held to preclude the application of official immunity.<sup>[FN6]</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Muslim Pakistani pretrial detainee's Bivens complaint against government officials failed to plead sufficient facts to state claim for purposeful and unlawful discrimination; complaint challenged neither constitutionality of detainee's arrest nor his initial detention but rather policy of holding post-September 11th detainees once they were categorized as of "high interest," and complaint thus had to contain facts plausibly showing that officials purposefully adopted policy of so classifying detainees because of their race, religion, or national origin. [Ashcroft v. Iqbal](#), 129 S. Ct. 1937, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 (2009).

[END OF SUPPLEMENT]

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[FN1] [Everitt v. General Elec. Co., 156 N.H. 202, 932 A.2d 831 \(2007\).](#)

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[FN2] [Telthorster v. Tennell, 92 S.W.3d 457 \(Tex. 2002\).](#)

- Particularly as to liability and immunity of: officers and employees of municipalities and other political subdivisions, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 247 to 251](#); the United States and its officers generally, see [Am. Jur. 2d, United States §§ 59 to 62](#); federal officers and employees under the Federal Tort Claims Act, see [Am. Jur. 2d, Federal Tort Claims Act §§ 1 et seq.](#); governors, see [Am. Jur. 2d, Governor § 11](#); prosecuting attorneys, see [Am. Jur. 2d, Prosecuting Attorneys § 4](#); police officers and sheriffs, see [Am. Jur. 2d, Sheriffs, Police and Constables §§ 45 to 66](#); judges, see [Am. Jur. 2d, Judges §§ 61 to 79](#); members of Congress, see [Am. Jur. 2d, United States § 7](#).

- As to immunity applying to negligent conduct, see §§ [324](#) to [326](#).

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[FN3] As to the distinction between absolute and qualified immunity, see §§ [307](#), [315](#).

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[FN4] [Rowan County v. Sloas, 201 S.W.3d 469 \(Ky. 2006\)](#), as corrected, (Sept. 26, 2006).

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[FN5] [Pearson v. Callahan, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\).](#)

- As to clearly established law or rights, see [§ 316](#).

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[FN6] §§ [327](#), [328](#).

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XI. Liability

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a. In General

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**§ 296. Immunity granted because of function, not office**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

Immunity is justified and defined by the functions involved,[\[FN1\]](#) not by the person to whom immunity attaches,[\[FN2\]](#) or that person's official status[\[FN3\]](#) or office.[\[FN4\]](#) There is no litmus test for determining which officials and employees should receive the benefit of judicially created immunity. In every case, a court must make a delicate balance: the need to free the particular officer to perform his or her functions without the vexation of defending lawsuits arising from their performance, against the right of an aggrieved party to seek redress.[\[FN5\]](#) The standard for determining the liability of a public servant is predicated on the type of act the official or employee has undertaken when the injury occurs[\[FN6\]](#) and not on the label of the public servant's position.[\[FN7\]](#) However, the official's position may affect whether such person is entitled to absolute, rather than merely qualified immunity.[\[FN8\]](#)

**Practice Tip:** In some jurisdictions, no distinction is made between public officials and public employees for the purpose of determining immunity.[\[FN9\]](#)

As to the definition of "public employee," see [§ 10](#).

As to personal tort liability of officers and employees of municipalities and other political subdivisions, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 247 to 251](#).

**CUMULATIVE SUPPLEMENT**

**Cases:**

Absolute legislative immunity did not protect members of the State Personnel Board in action by state employees' association to enjoin enforcement of amendment modifying public employees' deferred compensation plan, rather than challenge the members' authority to enact the amendment; members were not immune in enforcement capacities. Code 1975, § 36–26–6(b). [Ex parte Dickson, 46 So. 3d 468 \(Ala. 2010\)](#).

[END OF SUPPLEMENT]

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[\[FN1\] § 318.](#)

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[\[FN2\] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\).](#)

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[\[FN3\] Smith v. State, 289 N.C. 303, 222 S.E.2d 412 \(1976\)](#) (official status of state officers, standing alone, does not immunize them from suit).

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[\[FN4\] Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 \(1990\).](#)

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[\[FN5\] Hass for Use and Benefit of U.S. v. U.S., 518 F.2d 1138, 31 A.L.R. Fed. 137 \(4th Cir. 1975\).](#)

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[\[FN6\] § 318.](#)

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[\[FN7\] Fralin & Waldron, Inc. v. Henrico County, Va., 474 F. Supp. 1315 \(E.D. Va. 1979\); Rupp v. Bryant, 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 \(Fla. 1982\).](#)

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[\[FN8\]](#) As to persons entitled to absolute immunity, see §§ [307](#), [308](#).

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[\[FN9\] Rupp v. Bryant, 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 \(Fla. 1982\).](#)

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### XI. Liability

#### A. Civil Liability

##### 1. Liability of Public Officers

###### a. In General

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### § 297. Limitations on scope of immunity

#### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties.<sup>[FN1]</sup> Because immunity deprives individuals of a remedy for wrongdoing, it should be bestowed only when and at the level necessary.<sup>[FN2]</sup> The scope of immunity should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.<sup>[FN3]</sup> Official immunity must be narrowly construed in light of the fact that it is an exception to the general rule of liability.<sup>[FN4]</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Under North Carolina law, public officer acts with malice, as would preclude application of public officer's immunity, when he wantonly does that which man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial and injurious to another; act must be done of wicked purpose, or done needlessly, manifesting reckless indifference to rights of others. [Russ v. Causey, 732 F. Supp. 2d 589 \(E.D. N.C. 2010\)](#).

A suit against a public official acting in his official capacity will be barred by official immunity unless the official negligently performed a ministerial duty or acted with actual malice or an actual intent to cause injury while performing a discretionary duty. West's [Ga.Const. Art. 1, § 2, Par. 9\(d\)](#). [Barnard v. Turner County, 306 Ga. App. 235, 701 S.E.2d 859 \(2010\)](#).

##### [END OF SUPPLEMENT]

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<sup>[FN1]</sup> [Carrubba v. Moskowitz, 274 Conn. 533, 877 A.2d 773 \(2005\)](#).

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<sup>[FN2]</sup> [Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 5 A.L.R.4th 757 \(1977\)](#).

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[\[FN3\] Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166 \(1976\).](#)

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[\[FN4\] Larson v. Independent School Dist. No. 314, Braham, 289 N.W.2d 112 \(Minn. 1979\).](#)

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## **§ 298. Rationales for granting immunity**

### **West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

The immunity afforded to certain public officials from suits for money damages arising out of their official acts serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.[\[FN1\]](#) Under a functional approach to questions of official immunity from suits for monetary damages—other than those questions that have been decided by express constitutional or statutory enactment—the nature of the functions with which a particular official or class of officials has lawfully been entrusted is examined, and the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions is evaluated.[\[FN2\]](#) While it is often the case that high public officials have policy-making

functions, that is not the sole or overriding factor in determining the scope of immunity; rather, it is the public interest in seeing that the official not be impeded in the performance of important duties that is pivotal.[FN3]

Official immunity is designed to protect public officials from being forced to defend their decisions that were reasonable when made, but upon which hindsight has cast a negative light.[FN4] Immunity is based on the perception that public officers and employees would be unduly hampered, deterred, and intimidated in the discharge of their duties, if those who act improperly, or even exceed the authority given them, were not protected to some reasonable degree by being relieved from private liability.[FN5] Exposure to lawsuits would unfairly subject persons who have a duty to exercise discretion regarding matters of public policy to the judgment of those acting within a judicial system that is ill-suited to assess the full scope of factors involved in such decision-making.[FN6] The rationale for official immunity has been stated as the promotion of fearless, vigorous, and effective administration of policies of government.[FN7]

The threat of suit could deter competent people from taking office.[FN8] In the absence of immunity, public servants would be obligated to spend their time in court justifying their past actions, instead of performing their official duties. Ultimately, government, including good government, may be hampered, and qualified individuals may be hesitant to serve in positions that require great responsibility.[FN9]

Other public policy considerations that have led to the policy of immunity for public officers have been identified as the drain and valuable time caused by such actions, the unfairness of subjecting officials to personal liability for the acts of their subordinates, and a feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.[FN10]

## CUMULATIVE SUPPLEMENT

### Cases:

Qualified immunity is judicially created and rooted in public policy; fear of suit may have chilling effect on official decision-making, seriously deterring officials from exercising judgment with decisiveness important to their office. [Smith v. Kenny, 678 F. Supp. 2d 1093 \(D.N.M. 2009\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 \(1997\)](#).

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[FN2] [Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\)](#).

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[FN3] [Durham v. McElynn, 565 Pa. 163, 772 A.2d 68 \(2001\)](#).

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[FN4] [Telthorster v. Tennell, 92 S.W.3d 457 \(Tex. 2002\)](#).

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[FN5] [Jackson v. Kelly, 557 F.2d 735 \(10th Cir. 1977\)](#); [Neal v. Donahue, 1980 OK 82, 611 P.2d 1125 \(Okla. 1980\)](#); [Czechorowski v. State, 178 Vt. 524, 2005 VT 40, 872 A.2d 883 \(2005\)](#) (exposure would deter public employees from

vigorously discharging their duties in a prompt and decisive manner).

- As to the rationale for extending sovereign immunity to public officers, see [§ 303](#).

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[\[FN6\] Czechorowski v. State, 178 Vt. 524, 2005 VT 40, 872 A.2d 883 \(2005\).](#)

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[\[FN7\] Rupp v. Bryant, 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 \(Fla. 1982\); State ex rel. Eli Lilly & Co. v. Gaertner, 619 S.W.2d 761 \(Mo. Ct. App. E.D. 1981\); Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\).](#)

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[\[FN8\] Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 5 A.L.R.4th 757 \(1977\); Utah State University of Agriculture and Applied Science v. Sutro & Co., 646 P.2d 715, 4 Ed. Law Rep. 1311 \(Utah 1982\); Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\).](#)

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[\[FN9\] Chamberlain v. Mathis, 151 Ariz. 551, 729 P.2d 905 \(1986\).](#)

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[\[FN10\] Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\).](#)

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a. In General



## § 299. Balancing immunity against need to redress injuries

### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The interests furthered by absolute immunity are countered by basic principles of equal justice.<sup>[FN1]</sup> Immunity jurisprudence seeks to balance the protection of private citizens' rights against the substantial social costs of imposing liability on public officials<sup>[FN2]</sup> to compensate those who have been injured by official conduct while protecting government's ability to perform its traditional functions.<sup>[FN3]</sup> It balances the social utility of immunity against the social loss of being unable to attack the immune defendant.<sup>[FN4]</sup> In determining whether official immunity applies, the following are among the pertinent factors that must be considered:<sup>[FN5]</sup>

- (1) the nature of the function that the official is performing and its uniqueness in relation to the functions performed by the official's counterparts within the private sector;
- (2) the extent to which the imposition of liability in a particular action would hinder the free exercise of discretion by the officer in his or her general official duties;
- (3) the extent to which passing judgment in the exercise of discretion amounts to holding a coordinate branch of government accountable to the court for its conduct;
- (4) the nature of the injuries suffered by the parties seeking to impose liability upon the officer;
- (5) the likelihood and nature of the harm that will result to members of the public in the event that liability is imposed upon the government official;
- (6) the extent to which the ultimate financial responsibility will fall on the officer or employee; and
- (7) the availability to the injured party of other remedies and alternative forms of relief.

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<sup>[FN1]</sup> [Chamberlain v. Mathis, 151 Ariz. 551, 729 P.2d 905 \(1986\).](#)

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<sup>[FN2]</sup> [Smith v. Stafford, 189 P.3d 1065 \(Alaska 2008\).](#)

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<sup>[FN3]</sup> [Young v. Scales, 873 A.2d 337 \(D.C. 2005\).](#)

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[\[FN4\] State v. Second Judicial Dist. Court ex rel. County of Washoe, 118 Nev. 609, 55 P.3d 420 \(2002\).](#)

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[\[FN5\] Kalloo v. Englerth, 433 F. Supp. 504 \(D.V.I. 1977\).](#)

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**§ 300. Constitutional, statutory, or common-law bases of official immunity**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [114](#) to [118](#)

**A.L.R. Library**

[Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions, 24 A.L.R.6th 255](#)

The concept of official immunity arises from the common law,[\[FN1\]](#) and has been embodied in the United States Constitution's speech and debate clause, protecting members of Congress[\[FN2\]](#) and the Eleventh Amendment[\[FN3\]](#) which, in the absence of a state's consent, prohibits a suit in federal court in which a state or one of its agencies or departments is named as a defendant.[\[FN4\]](#)

The scope of an officer's liability in tort may be broadened or restricted by legislative action.[\[FN5\]](#) In this regard, state statutes often provide immunity from tort liability to public officers and employees.[\[FN6\]](#)

**Comment:** State statutes may affect the officer's liability in various ways. Thus, some statutes provide that any tort action must be brought against an officer, not the government, and that the government will then pay the judgment. Statutes imposing limitations or restrictions on governmental tort liability often provide or are construed to provide for the same limitations on the officer's liability.[\[FN7\]](#)

Immunity provided by statute may not be abrogated by a second statute that simply imposes a general legal duty or liability on persons, including public employees. Such a statute may indeed render the employee liable for violations unless a specific immunity applies, but it does not remove the immunity. This further effect can only be achieved by a clear indication of legislative intent that statutory immunity is withheld or withdrawn in the particular statute.[\[FN8\]](#)

**Observation:** An immunity provision need not even be considered until it is determined that a cause of action would otherwise lie against the public employee.[\[FN9\]](#)

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[\[FN1\] U. S. v. Gillock, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454, 5 Fed. R. Evid. Serv. 945 \(1980\); Trimble v. City and County of Denver, 697 P.2d 716 \(Colo. 1985\); Fleming v. City of Bridgeport, 284 Conn. 502, 935 A.2d 126 \(2007\); Schroeder v. St. Louis County, 708 N.W.2d 497 \(Minn. 2006\).](#)

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[\[FN2\] Dombrowski v. Eastland, 387 U.S. 82, 87 S. Ct. 1425, 18 L. Ed. 2d 577 \(1967\)](#) (regarding [U.S. Const. Art. I, § 6, cl. 1](#)).

- As to legislative immunity of members of Congress generally, see [Am. Jur. 2d, United States § 7](#).

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[\[FN3\] U.S. Const. Amend. XI.](#)

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[\[FN4\] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 \(1984\)](#) (also holding that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter).

- As to immunity of states and their subdivisions from lawsuits generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 37 to 46](#).

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[\[FN5\] Restatement Second, Torts § 895D](#), comment i.

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[\[FN6\] Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 \(1989\)](#) (statute providing that certain public officials were immune from tort liability for negligent acts committed in the performance of their official duties); [Barner v. Leeds, 24 Cal. 4th 676, 102 Cal. Rptr. 2d 97, 13 P.3d 704 \(2000\)](#) (statute providing that, except as otherwise provided by statute, a public employee is not liable for injury resulting from act or omission where it was result of exercise of discretion vested in the employee, whether or not such discretion was abused); [McNamara v. Honeyman, 406 Mass. 43, 546 N.E.2d 139 \(1989\)](#)

(immunity from personal liability extends to public employees acting within scope of duties).

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[FN7] [Restatement Second, Torts § 895D](#), comment i.

- As to governmental tort liability generally, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.](#)

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[FN8] [Caldwell v. Montoya](#), 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320, 101 Ed. Law Rep. 1154 (1995).

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[FN9] [Caldwell v. Montoya](#), 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320, 101 Ed. Law Rep. 1154 (1995).

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

a. In General

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## **§ 301. Necessity that officer act within scope of authority**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

Immunity generally protects an officer only to the extent that he or she is acting in the general scope of his or her official authority.[FN1] Under the Restatement, a public officer acting within the general scope of his or her authority is

immune from tort liability for an act or omission involving the exercise of a judicial or legislative function.<sup>[FN2]</sup> A public officer acting within the general scope of his or her authority is not subject to tort liability for an administrative act or omission if—

— the officer is immune because engaged in the exercise of a discretionary function;<sup>[FN3]</sup>

— the officer is privileged and does not exceed or abuse the privilege;<sup>[FN4]</sup>

— the officer's conduct was not tortious because the officer was not negligent in the performance of his or her responsibility.<sup>[FN5]</sup>

An official has no immunity for actions outside his or her authority,<sup>[FN6]</sup> or if acting outside and beyond the scope of his or her duties.<sup>[FN7]</sup> In this regard, when a public official goes entirely beyond the scope of the official's authority and does an act that is not permitted at all by official duty, the official is not acting in an official capacity and has no more immunity than a private citizen.<sup>[FN8]</sup> Such an officer may thereby become amenable to personal liability in a civil suit.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Restatement Second, Torts § 895D](#), comment g.

- In determining the scope of a public official's authority, and whether the act complained of was beyond that scope, for purposes of qualified official immunity, the issue is not whether the official properly exercised his or her discretionary duties or whether he or she violated the law. Qualified immunity shields a public officer or employee from suit when making a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances confronted. [Rowan County v. Sloats](#), 201 S.W.3d 469 (Ky. 2006), as corrected, (Sept. 26, 2006).

- A state tort claims act extended immunity from personal liability to public employees acting within the scope of their duties. [McNamara v. Honeyman](#), 406 Mass. 43, 546 N.E.2d 139 (1989).

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<sup>[FN2]</sup> [Restatement Second, Torts § 895D\(2\)](#).

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<sup>[FN3]</sup> [Restatement Second, Torts § 895D\(3\)\(a\)](#).

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<sup>[FN4]</sup> [Restatement Second, Torts § 895D\(3\)\(b\)](#).

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<sup>[FN5]</sup> [Restatement Second, Torts § 895D\(3\)\(c\)](#).

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<sup>[FN6]</sup> [Trimble v. City and County of Denver](#), 697 P.2d 716 (Colo. 1985); [State ex rel. Jacobs v. Sherard](#), 36 N.C. App. 60, 243 S.E.2d 184 (1978).

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<sup>[FN7]</sup> [Jones v. Kearns](#), 120 N.C. App. 301, 462 S.E.2d 245 (1995).

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<sup>[FN8]</sup> [Restatement Second, Torts § 895D](#), comment g.

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[FN9] [White v. Towers](#), 37 Cal. 2d 727, 235 P.2d 209, 28 A.L.R.2d 636 (1951); [Kern v. Miller](#), 216 Kan. 724, 533 P.2d 1244 (1975); [Heiser v. Severy](#), 117 Mont. 105, 158 P.2d 501, 160 A.L.R. 319 (1945); [Swedlund v. Foster](#), 2003 SD 8, 657 N.W.2d 39 (S.D. 2003) (no probable cause to restrain person; officers subject to liability); [Oyler v. State](#), 618 P.2d 1042 (Wyo. 1980).

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A. Civil Liability  
1. Liability of Public Officers  
a. In General

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## § 302. Official immunity as distinguished from sovereign immunity

### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) 113 to [118](#)

Governmental, or sovereign, immunity rests on the need to protect policymaking activities that involve a balancing of social, political, or economic considerations. Official immunity, on the other hand, protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.[FN1] Official immunity generally protects individual officials from liability, while sovereign immunity protects governmental entities from liability.[FN2] Thus, sovereign immunity and official immunity constitute two distinct concepts.[FN3] The state's sovereign immunity from suit is procedural in nature, while the immunity afforded public officers with respect to

the performance of their official functions is a substantive limitation on their personal liability for damages in its common law.[\[FN4\]](#)

The immunity of public officials is a more limited principle than governmental immunity, since its purpose is not directly to protect the sovereign, but rather to do so only collaterally, by protecting the public official in the performance of a government function.[\[FN5\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

"Official immunity" is an affirmative defense that protects a government employee from liability in a lawsuit when the employee performs discretionary duties within the scope of the employee's authority provided the employee acted in good faith. [Maxwell v. Willis, 316 S.W.3d 680 \(Tex. App. Eastland 2010\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Elwood v. Rice County, 423 N.W.2d 671 \(Minn. 1988\)](#).

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[\[FN2\] City of Beverly Hills v. Guevara, 911 S.W.2d 901 \(Tex. App. Waco 1995\)](#).

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[\[FN3\] Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\)](#).

- As to the sovereign immunity of the state and federal governments generally, see [Am. Jur. 2d, States, Territories, and Dependencies §§ 97 to 121](#); [Am. Jur. 2d, United States §§ 59 to 62](#).

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[\[FN4\] Lister v. Board of Regents of University Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 \(1976\)](#).

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[\[FN5\] Davis v. Little, 362 So. 2d 642 \(Miss. 1978\)](#).

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**§ 303. Applicability of sovereign immunity to public officers or employees**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Suing state public officials in their official capacities is tantamount to suing the state or its affiliated entities themselves, and any immunities protecting such state entities will similarly shield the public officials affiliated with them when they are sued in their official capacities. An action brought nominally against a state employee in his or her individual capacity will generally be considered a claim against the state and will be barred by sovereign immunity if a judgment in favor of the plaintiff could operate to control the actions of the state or subject it to liability.<sup>[FN1]</sup> States' Eleventh Amendment immunity generally extends to officers acting on behalf of the state.<sup>[FN2]</sup> However, the fact that an official acts under color of law does not mean that he or she becomes the state so as to enjoy sovereign immunity in federal courts under the federal Constitution.<sup>[FN3]</sup>

Under some state law, only a governmental unit of the state may invoke the limitations or protection of the doctrine of sovereign immunity, and such defense does not inure to the benefit of any individual.<sup>[FN4]</sup> However, in other jurisdictions, sovereign immunity may apply in certain circumstances to protect a public employee.<sup>[FN5]</sup> A state employee is not immunized for his or her own acts of negligence merely because he or she was acting within the scope of employment. In analyzing the issue of when a state employee's on-the-job negligence is immunized, the proper inquiry is to analyze the source of the duty the employee is charged with breaching in committing the allegedly tortious act. Where the charged act arose out of the state employee's breach of a duty that is imposed on him or her solely by virtue of state employment, sovereign immunity bars maintenance of the action. Where the employee is charged with breaching a duty imposed on him or her independently of state employment, sovereign immunity does not attach and a claim may be maintained. Public officials' immunity does not apply to every discretionary act by an official, but rather only to those acts that are unique to the particular public office.<sup>[FN6]</sup>

**Observation:** The rationale behind extending sovereign immunity to state employees in certain situations is that a suit against that employee could operate to control the actions of the state, thereby allowing the state's immunity to be circumvented. Limiting immunity for a state employee to situations where he or she breaches a duty imposed solely by virtue of official position furthers this rationale, for control over the actions and policies of the state can be achieved only by controlling the employee's performance of "official" actions.<sup>[FN7]</sup>



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[FN1] [Am. Jur. 2d, States, Territories, and Dependencies § 105](#).

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[FN2] [Blumberg v. Nassau Health Care Corp., 378 F. Supp. 2d 122 \(E.D. N.Y. 2005\)](#).

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[FN3] [Medina Perez v. Fajardo, 257 F. Supp. 2d 467, 177 Ed. Law Rep. 169 \(D.P.R. 2003\)](#) (no sovereign immunity for defendant in federal civil rights action against police officer and school officials to recover for sexual abuse of student by police officer assigned to school).

- The Director of the Colorado Department of Human Services was entitled to Eleventh Amendment immunity, in an action by a mother whose child had been killed in a state-licensed day-care facility, to the extent the claim was asserted against the director in her official capacity; as a state official, the director was acting as an arm of the state. [Ruiz v. McDonnell, 299 F.3d 1173, 53 Fed. R. Serv. 3d 1425 \(10th Cir. 2002\)](#).

- As to the sovereign immunity of the state and federal governments generally, see [Am. Jur. 2d, States, Territories, and Dependencies §§ 97 to 121](#); [Am. Jur. 2d, United States §§ 59 to 62](#).

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[FN4] [Rhodes v. Torres, 901 S.W.2d 794 \(Tex. App. Houston 14th Dist. 1995\)](#).

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[FN5] [Logue v. Wright, 260 Ga. 206, 392 S.E.2d 235 \(1990\)](#); [Currie v. Lao, 148 Ill. 2d 151, 170 Ill. Dec. 297, 592 N.E.2d 977 \(1992\)](#).

-

[FN6] [Currie v. Lao, 148 Ill. 2d 151, 170 Ill. Dec. 297, 592 N.E.2d 977 \(1992\)](#).

- Sovereign immunity is not applicable where an action is sought to prevent the commission of a wrongful act by an officer acting under color of authority and beyond the scope of his or her official power. [DeKalb County v. Townsend Associates, Inc., 243 Ga. 80, 252 S.E.2d 498 \(1979\)](#).

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[FN7] [Currie v. Lao, 148 Ill. 2d 151, 170 Ill. Dec. 297, 592 N.E.2d 977 \(1992\)](#).

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

a. In General

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**§ 304. Applicability of sovereign immunity to public officers or employees—Ex parte Young exception**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The doctrine of *Ex parte Young*,<sup>[FN1]</sup> is an exception to sovereign immunity for prospective injunctive relief from violations of federal law.<sup>[FN2]</sup> A federal court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.<sup>[FN3]</sup> In an action to enjoin actions by individuals who comprise a public body, a plaintiff may include the individuals as defendants in their official capacity.<sup>[FN4]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. [U.S.C.A. Const.Amend. 11. Virginia Office for Protection and Advocacy v. Stewart, 131 S. Ct. 1632 \(2011\).](#)

**[END OF SUPPLEMENT]**

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<sup>[FN1]</sup> [Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 \(1908\).](#)

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<sup>[FN2]</sup> [State Employees Bargaining Agent Coalition v. Rowland, 494 F.3d 71 \(2d Cir. 2007\).](#)

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[\[FN3\] Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 \(2002\).](#)

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[\[FN4\] Mountain Cable Co. v. Public Service Bd. of State of Vt., 242 F. Supp. 2d 400, 55 Fed. R. Serv. 3d 499 \(D. Vt. 2003\)](#)  
(lawsuit against public service commissioners to enjoin action allegedly in violation of federal cable act).

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## **§ 305. Applicability of sovereign immunity to public officers or employees—Federal employees**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

A suit for damages against a federal agent in his or her official capacity would be barred by sovereign immunity, unless the government has waived sovereign immunity. But a suit for damages against a federal agent in his or her individual capacity acting under color of federal authority would not be barred by sovereign immunity, insofar as certain constitutional claims are made.[\[FN1\]](#)

**Observation:** Immunity for federal employees is provided under some federal statutes, For example, the Federal Employees Liability Reform and Tort Compensation Act[\[FN2\]](#) immunizes federal employees from liability if they commit negligent or wrongful acts or omissions while acting within the scope of their office or employment.[\[FN3\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Bivens recognizes implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights. [Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 \(2009\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 \(1971\)](#).

- As to so-called Bivens actions, see [Am. Jur. 2d, Civil Rights §§ 110 to 119](#).

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[FN2] [28 U.S.C.A. § 2679](#).

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[FN3] [Bieregu v. Ashcroft, 259 F. Supp. 2d 342 \(D.N.J. 2003\)](#).

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## § 306. Insurance coverage as waiving immunity

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

An insurance contract covering public officers or employees may serve to waive the defense of qualified or official immunity.<sup>[FN1]</sup> In this regard, it has been said that a government official waives immunity from liability for discretionary functions of properly supervising employees performing such functions under a state tort claims act to the extent he or she enjoys the protection of liability insurance for discretionary functions.<sup>[FN2]</sup> Furthermore, where there is a formal self-insurance plan or a policy covering official acts of a public official, sovereign immunity applicable to public employees is waived, although this rule applies in some jurisdictions only where a state self-insurance plan is involved.<sup>[FN3]</sup>

It has been held that immunity is not available for a physician providing services for a county where the potential for insurance, indemnification agreements, and higher pay may operate to encourage qualified candidates to engage in an endeavor despite the unavailability of immunity.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 \(1995\).](#)

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<sup>[FN2]</sup> [Riplett v. Bemis, 672 A.2d 82 \(Me. 1996\).](#)

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<sup>[FN3]</sup> [Logue v. Wright, 260 Ga. 206, 392 S.E.2d 235 \(1990\)](#), rejecting the argument that a county Department of Risk Management, budgeted to compensate claims against the county and its employees, constituted a self-insurance program that waived sovereign immunity.

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<sup>[FN4]</sup> [Jensen v. Lane County, 222 F.3d 570 \(9th Cir. 2000\).](#)

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**§ 307. Generally; persons to whom it applies**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Absolute immunity defeats a suit at the outset, while an official with qualified immunity must establish that his or her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[FN1] Absolute immunity immunizes officials from tort suits for all official acts without regard to motive, whereas qualified immunity immunizes official acts only when undertaken in good faith.[FN2] It is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation generally.[FN3]

Absolute immunity of government officials from suits for monetary damages is justified only when the danger of officials' being deflected from the effective performance of their duties is very great.[FN4] Government officials whose duties require a full exemption from liability, and so are entitled to absolute immunity, include judges performing judicial acts within their jurisdiction, prosecutors in the performance of their official functions, and certain quasi-judicial agency officials who, irrespective of their title, perform functions essentially similar to those of judges or prosecutors in a setting similar to that of a court.[FN5] An immunity attaches to particular official functions, not to particular officers.[FN6] A government employee is entitled to absolute immunity when he or she performs a discretionary act, and if the action of the government employee is found to exceed the scope of his or her discretion, that immunity may not apply.[FN7]

Absolute immunity is effectively lost if a case is erroneously permitted to go to trial;[FN8] in this regard, because absolute immunity carries with it the right to avoid trial as a party defendant, review after final judgment will not protect that right.[FN9]

**Observation:** It has been observed that there has been a marked restriction in the circumstances in which absolute immunity is applicable. This has been accomplished by the twin development of limiting the positions that qualify for absolute immunity and limiting the functions to which such immunity is applicable.[FN10]

## CUMULATIVE SUPPLEMENT

### Cases:

In determining whether an official has engaged in a quasi-judicial act sufficiently similar to that of a judge so as to entitle the official to absolute immunity from suits for damages, the court must first determine if the official performs traditional adjudicatory functions, in that the official decides facts, applies law, and otherwise resolves disputes on the merits; second, it is necessary to determine if the official, like a judge, decides cases sufficiently controversial that, in the absence of absolute immunity, the official would be subject to numerous damages actions; third, the court must determine if the official, like a judge, adjudicates disputes against a backdrop of multiple safeguards designed to protect an individual's constitutional rights. [Gonzalez-Droz v. Gonzalez-Colon, 717 F. Supp. 2d 196 \(D.P.R. 2010\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Witzke v. City of Bismarck, 2006 ND 160, 718 N.W.2d 586 \(N.D. 2006\)](#).

- As to qualified immunity, see §§ [314](#) to [316](#).

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[FN2] [Jones v. Perrigan, 459 F.2d 81 \(6th Cir. 1972\)](#); [Smith v. Stafford, 189 P.3d 1065 \(Alaska 2008\)](#); [Minch v. D.C., 952 A.2d 929 \(D.C. 2008\)](#).

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[FN3] [State v. Second Judicial Dist. Court ex rel. County of Washoe, 118 Nev. 609, 55 P.3d 420 \(2002\)](#).

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[FN4] [Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\)](#).

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[FN5] [O'Neal v. Mississippi Bd. of Nursing, 113 F.3d 62 \(5th Cir. 1997\)](#).

- The view has sometimes been followed that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and, indeed, is improper. [Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 5 A.L.R.4th 757 \(1977\)](#).

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[FN6] [O'Neal v. Mississippi Bd. of Nursing, 113 F.3d 62 \(5th Cir. 1997\)](#).

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[FN7] [Lewis v. Keegan, 2006 ME 93, 903 A.2d 342, 211 Ed. Law Rep. 941 \(Me. 2006\)](#).

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[FN8] [Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 \(2007\)](#); [Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\)](#); [Furnace v. Oklahoma Corp. Com'n, 51 F.3d 932 \(10th Cir. 1995\)](#); [Rich v. Dollar, 841 F.2d 1558 \(11th Cir. 1988\)](#).

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[FN9] [Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 \(1990\)](#).

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[\[FN10\] Davis v. Knud-Hansen Memorial Hospital, 635 F.2d 179 \(3d Cir. 1980\).](#)

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XI. Liability

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**§ 308. Generally; persons to whom it applies—Factors to consider**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

In determining whether an official or other government employee is entitled to absolute immunity, factors to be considered include:

(1) the need to assure that the individual can perform his or her functions without harassment or intimidation;

(2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(3) insulation from political influence;



- (4) the importance of precedent;
- (5) the adversary nature of the process; and
- (6) the correctability of error on appeal.[\[FN1\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

The "functional approach" utilized to determine whether an individual is entitled to absolute immunity takes into consideration various factors including: whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences. [Marvin v. Fitch, 126 Nev. 18, 232 P.3d 425 \(2010\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Disraeli v. Rotunda, 489 F.3d 628 \(5th Cir. 2007\); Buser v. Raymond, 476 F.3d 565 \(8th Cir. 2007\); Smith v. Shook, 237 F.3d 1322 \(11th Cir. 2001\)](#).

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XI. Liability

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## § 309. Judges, legislators, prosecutors, and executive officials

### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Absolute immunity generally is provided to a government official in a civil action when the plaintiff's claim against the official is directly attributable to the official's performance of judicial, legislative, or prosecutorial functions.[FN1] Judges,[FN2] legislators,[FN3] and the highest executive officials of all levels of government[FN4] generally are absolutely immune from all tort liability whenever they are acting within their respective judicial, legislative, and executive authority.[FN5] Absolute quasi-judicial immunity is extended to nonjudicial officers if they perform official duties that are functionally comparable to those of judges, that is, duties that involve the exercise of discretion in resolving disputes.[FN6]

It has been noted, however, that the highest executive officials in the states are not protected by absolute immunity under federal law.[FN7]

Absolute immunity applies to members of Congress for certain legislative acts,[FN8] judges who have jurisdiction over the subject matter and are performing a judicial act,[FN9] prosecutors for prosecutorial functions,[FN10] and certain executive officials performing certain judicial and prosecutorial functions in their official capacities.[FN11] Since the extent of an immunity afforded a government official is to be determined by the nature of the act complained of, rather than the name of the office in which he or she serves,[FN12] it has been said that even those who generally serve in an executive position may be entitled to absolute immunity from suit when their duties encompass acts necessary to the process of enacting legislation.[FN13]

It has been held that even local legislators are entitled to absolute immunity from civil liability for their legislative activities,[FN14] because there is no rational basis for distinguishing the safeguards necessary to permit local legislators to carry out their legislative duties from those which have been clearly accorded the state legislators.[FN15] The doctrine of absolute legislative immunity is not reserved solely for legislators, and officials outside the legislative branch have been afforded legislative immunity when they perform legislative functions.[FN16] However, absolute immunity from suit arises only where a legislator's allegedly injurious conduct has generally occurred in the process of enacting legislation.[FN17]

### CUMULATIVE SUPPLEMENT

#### Cases:

Qualified immunity is immunity from suit rather than mere defense to liability. [Pearson v. Callahan, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\)](#).

Protection of qualified immunity applies regardless of whether government official's error is mistake of law, mistake of fact, or mistake based on mixed questions of law and fact. [Pearson v. Callahan, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\)](#).

[END OF SUPPLEMENT]

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[FN1] [Rockefeller v. U.S. Court of Appeals Office, for Tenth Circuit Judges, 248 F. Supp. 2d 17 \(D.D.C. 2003\)](#).

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[FN2] [Smith v. Gomez, 550 F.3d 613 \(7th Cir. 2008\)](#).

- As to civil liability and immunity of judges, see [Am. Jur. 2d, Judges §§ 68 to 71](#).

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[FN3] [Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641, 23 Ed. Law Rep. 671 \(1984\)](#).

- As to legislative immunity of members of Congress generally, see [Am. Jur. 2d, United States § 7](#).

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[FN4] [Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641, 23 Ed. Law Rep. 671 \(1984\)](#).

- As to immunity from civil liability of heads of departments of the federal government generally, see [Am. Jur. 2d, United States § 62](#).

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[FN5] [Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641, 23 Ed. Law Rep. 671 \(1984\)](#).

- As to personal tort liability of officers and employees of municipalities and other political subdivisions generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 247 to 251](#).

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[FN6] [Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 \(1993\)](#); [In re Castillo, 297 F.3d 940 \(9th Cir. 2002\)](#), as amended, (Sept. 6, 2002).

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[FN7] [Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\)](#).

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[FN8] [Am. Jur. 2d, United States § 7](#).

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[FN9] [Am. Jur. 2d, Judges § 63](#).

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[FN10] [Am. Jur. 2d, Prosecuting Attorneys § 4](#).

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[FN11] [Jones v. Clinton, 72 F.3d 1354 \(8th Cir. 1996\)](#), judgment aff'd, [520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 \(1997\)](#).

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[FN12] [§ 296](#).

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[FN13] [Fralin & Waldron, Inc. v. Henrico County, Va., 474 F. Supp. 1315 \(E.D. Va. 1979\)](#) (members of a planning commission were engaged in legislation when recommending that land be rezoned; such immunity did not extend to

executive actions in enforcing the zoning change).

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[FN14] [Figueroa-Serrano v. Ramos-Alverio](#), 221 F.3d 1 (1st Cir. 2000); [Lorusso v. Borer](#), 359 F. Supp. 2d 121 (D. Conn. 2005).

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[FN15] [Fralin & Waldron, Inc. v. Henrico County, Va.](#), 474 F. Supp. 1315 (E.D. Va. 1979).

- As to immunity of public officials from personal liability under federal civil rights statutes, see [Am. Jur. 2d, Civil Rights §§ 99, 102](#).

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[FN16] [Maynard v. Beck](#), 741 A.2d 866 (R.I. 1999).

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[FN17] [Fralin & Waldron, Inc. v. Henrico County, Va.](#), 474 F. Supp. 1315 (E.D. Va. 1979).

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

b. Absolute Immunity

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**§ 310. Federal officers**

## West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) 113 to [118](#)

Federal officers receive immunity in many situations; such immunity must be affirmatively justified, and does not flow automatically from the government's retained sovereign immunity.<sup>[FN1]</sup> Rather, absolute immunity for federal officials is justified only when the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.<sup>[FN2]</sup> Thus, a federal officer's immunity is justified only insofar as it is necessary to protect the officer's performance of a governmental function, reflecting the concern that federal officials be granted absolute immunity only insofar as the benefits of immunity outweigh the costs.<sup>[FN3]</sup> Federal officers are not immune if they violate clearly established constitutional rights, while the government itself is immune, even if the right allegedly violated by the officer is clearly established.<sup>[FN4]</sup> A federal officer is absolutely immune from state law tort suits only if performing a discretionary function in the scope of employment, and not if performing a ministerial function in the scope of employment.<sup>[FN5]</sup>

While the privilege of absolute immunity is available to low-ranking and high-ranking officials alike, conduct that would not be immunized at a higher level cannot be immunized by delegating it to a lower official and making it a mandatory duty. In such a case, the scope of immunity is determined with reference to that of the higher official.<sup>[FN6]</sup>

**Practice Tip:** Federal, not state, law governs the application of the immunity doctrine to federal officers and employees.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [Westfall v. Erwin](#), 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988); [McMahon v. Presidential Airways, Inc.](#), 502 F.3d 1331, 24 A.L.R. Fed. 2d 729 (11th Cir. 2007).

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<sup>[FN2]</sup> [Westfall v. Erwin](#), 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988).

- The Attorney General was not individually liable for alleged unconstitutional conditions of confinement of aliens awaiting removal at local jails, despite statutory provisions holding the Attorney General responsible for housing aliens awaiting removal. [Oladipupo v. Austin](#), 104 F. Supp. 2d 623 (W.D. La. 2000), aff'd, [243 F.3d 210](#) (5th Cir. 2001).

- As to the sovereign immunity of the federal government generally, see [Am. Jur. 2d, United States §§ 59](#) to [62](#).

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<sup>[FN3]</sup> [Westfall v. Erwin](#), 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988).

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<sup>[FN4]</sup> [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

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<sup>[FN5]</sup> [Westfall v. Erwin](#), 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988).

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<sup>[FN6]</sup> [Ricci v. Key Bancshares of Maine, Inc.](#), 768 F.2d 456 (1st Cir. 1985).

- As to immunity of the president and presidential aides and advisers, see [§ 312](#).

- Particularly as to liability and immunity of: the United States and its officers, see [Am. Jur. 2d, United States §§ 59 to 62](#); prosecuting attorneys, see [Am. Jur. 2d, Prosecuting Attorneys § 4](#); police officers and sheriffs, see [Am. Jur. 2d, Sheriffs, Police and Constables §§ 45 to 66](#); judges, see [Am. Jur. 2d, Judges §§ 61 to 76](#); members of Congress, see [Am. Jur. 2d, United States § 7](#).

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[\[FN7\] Chafin v. Pratt, 358 F.2d 349 \(5th Cir. 1966\).](#)

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A. Civil Liability

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**§ 311. Federal officers—Under federal statutes**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

The Federal Tort Claims Act, [\[FN1\]](#) which waives government immunity broadly, [\[FN2\]](#) nonetheless expressly excludes from its application any claim based on an act or omission of a government employee exercising due care in the execution of a statute or regulation, whether valid or not, or based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a federal agency or government employee, whether or not the discretion is abused. [\[FN3\]](#)

A federal statute providing that certain federal agencies may not require or obtain a surety bond for an officer or employee of the United States government in carrying out official duties[[FN4](#)] does not affect the personal financial liability of such officer or employee.[[FN5](#)]

Upon proof by a preponderance of the evidence[[FN6](#)] that a person has engaged in conduct constituting bribery, graft, or conflict of interest under specific criminal statutes pertaining to the conduct of public officers,[[FN7](#)] such person is subject to a civil penalty, as specified by statute.[[FN8](#)]

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[[FN1](#)] [28 U.S.C.A. § 2674](#).

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[[FN2](#)] [Am. Jur. 2d, Federal Tort Claims Act § 2](#).

- As to federal officers and employees under the Federal Tort Claims Act, see [Am. Jur. 2d, Federal Tort Claims Act §§ 1 et seq.](#)

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[[FN3](#)] [28 U.S.C.A. § 2680\(a\)](#), discussed at [Am. Jur. 2d, Federal Tort Claims Act § 34](#).

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[[FN4](#)] [§ 127](#).

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[[FN5](#)] [31 U.S.C.A. § 9302](#).

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[[FN6](#)] [§ 410](#).

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[[FN7](#)] [18 U.S.C.A. §§ 203](#) to [209](#).

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[[FN8](#)] [18 U.S.C.A. § 216\(b\)](#).

- As to criminal statutes affecting federal employees, see §§ [369](#) to [377](#).

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- A. Civil Liability
- 1. Liability of Public Officers
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**§ 312. Federal officers—President; presidential aides and advisers**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The President of the United States is entitled to absolute immunity from civil liability for his or her official acts.<sup>[FN1]</sup> In view of the special nature of the President's constitutional office and functions, it has been said to be appropriate to recognize absolute presidential immunity from damages liability for acts within the "outer perimeter" of his or her official responsibility.<sup>[FN2]</sup> However, the President is not entitled to immunity from civil suits alleging actionable behavior in the President's private capacity. Thus, a sitting President is not immune from suit for unofficial acts; the Constitution does not confer upon a President any immunity from civil actions that arise from unofficial acts.<sup>[FN3]</sup> Neither the doctrine of separation of powers, nor the need for confidentiality in high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.<sup>[FN4]</sup>

In a suit for civil damages based upon their official acts, senior aides and advisers of the President are not entitled to a blanket protection of absolute immunity as an incident of their offices as presidential aides either derivatively from the President's absolute immunity or from their special functions as presidential aides, but are generally entitled to the application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial.<sup>[FN5]</sup> The President's absolute immunity is based upon the President's unique position in the constitutional scheme, and does not extend indiscriminately to the President's personal aides, or to Cabinet-level officers.<sup>[FN6]</sup> However, senior aides and advisers may establish entitlement to absolute immunity if they can show that the responsibilities of office embraced functions so sensitive as to require a total shield from liability, and then can demonstrate that they were discharging the protected functions when performing the act for which liability is asserted.<sup>[FN7]</sup>



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[FN1] [Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 \(1982\)](#); [Jones v. Clinton, 72 F.3d 1354 \(8th Cir. 1996\)](#), judgment aff'd, [520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 \(1997\)](#).

- For discussion of the office of the Presidency generally, see [Am. Jur. 2d, United States §§ 17 to 23](#); as to immunity from civil liability of heads of executive departments, see [Am. Jur. 2d, United States § 59](#).

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[FN2] [Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 \(1982\)](#).

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[FN3] [Jones v. Clinton, 72 F.3d 1354 \(8th Cir. 1996\)](#), judgment aff'd, [520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 \(1997\)](#).

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[FN4] [Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 \(1997\)](#).

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[FN5] [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#).

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[FN6] [Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\)](#).

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[FN7] [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#).

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XI. Liability

A. Civil Liability  
1. Liability of Public Officers  
b. Absolute Immunity

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**§ 313. Social workers involved in placement of children; guardians ad litem**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The courts have sometimes extended absolute immunity to social workers participating in child placement proceedings, custody disputes, and other judicial proceedings.[FN1] The rationale is that the fear of financially devastating litigation would compromise caseworkers' judgment and deprive the court of information it needs to make an informed decision.[FN2] However, a social worker is entitled to qualified, not absolute immunity for actions as an investigator and adviser to a city government in recommending that a neglect proceeding be brought, where the social worker's role is analogous to a police officer's role prior to giving testimony in a criminal prosecution.[FN3] Social workers who allegedly fabricated information contained in statements of facts that they attached to child dependency and custody petitions signed under penalty of perjury are not entitled to absolute immunity from claims that they violated the parents' constitutional rights.[FN4] A court needs to examine the functions of social workers to determine whether the functions are discretionary; if the functions were discretionary, and not functionally similar to prosecutorial or judicial decisions, qualified immunity, not absolute immunity, is available.[FN5]

Some courts apply qualified immunity, rather than absolute immunity, to social workers involved in child placement.[FN6]

A guardian ad litem, appointed in connection with the court approval of a settlement involving a minor, has been held absolutely immune from liability for his or her actions taken pursuant to the appointment when performing his or her role in child custody and related proceedings.[FN7]

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[FN1] [Vosburg v. Department of Social Services](#), 884 F.2d 133 (4th Cir. 1989); [Kurzawa v. Mueller](#), 732 F.2d 1456 (6th Cir. 1984); [Dornheim v. Sholes](#), 430 F.3d 919 (8th Cir. 2005) (testimony as witness in child custody dispute, which involved acting within scope of role within judicial process); [Babcock v. Tyler](#), 884 F.2d 497 (9th Cir. 1989); [Coverdell v. Department of Social and Health Services, State of Wash.](#), 834 F.2d 758, 10 Fed. R. Serv. 3d 143 (9th Cir. 1987); [Gray v. Poole](#), 275 F.3d 1113 (D.C. Cir. 2002) (witness in child neglect proceeding); [Martin v. Children's Aid Soc.](#), 215 Mich. App. 88, 544 N.W.2d 651 (1996).

- But see [Gardner by Gardner v. Parson](#), 874 F.2d 131, 13 Fed. R. Serv. 3d 834 (3d Cir. 1989) (holding that social workers acting as guardians ad litem for the purposes of child placement litigation should be afforded absolute immunity only for conduct that is an integral part of the judicial process); [Fleming v. Asbill](#), 42 F.3d 886 (4th Cir. 1994) (noting the divergence of authority on this point, but finding it unnecessary to resolve the issue inasmuch as the guardian ad litem in the case at bar was entitled to absolute immunity under either view).

- As to dependent and neglected children, and the disposition of such children, see [Am. Jur. 2d, Juvenile Courts and](#)

[Delinquent and Dependent Children §§ 1 et seq.](#)

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[FN2] [Martin v. Children's Aid Soc., 215 Mich. App. 88, 544 N.W.2d 651 \(1996\).](#)

- As to the right of appeal from decision in juvenile court generally, see [Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children §§ 126 to 134.](#)

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[FN3] [Gray v. Poole, 275 F.3d 1113 \(D.C. Cir. 2002\).](#)

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[FN4] [Beltran v. Santa Clara County, 514 F.3d 906 \(9th Cir. 2008\).](#)

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[FN5] [Miller v. Gammie, 335 F.3d 889 \(9th Cir. 2003\).](#)

- As to discretionary functions, see §§ [318](#), [319](#).

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[FN6] [Smith v. Stafford, 189 P.3d 1065 \(Alaska 2008\).](#)

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[FN7] [Dornheim v. Sholes, 430 F.3d 919 \(8th Cir. 2005\); Collins on Behalf of Collins v. Tabet, 111 N.M. 391, 806 P.2d 40, 14 A.L.R.5th 1094 \(1991\).](#)

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XI. Liability

A. Civil Liability

## 1. Liability of Public Officers

### c. Qualified Immunity

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#### § 314. Generally

##### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

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##### Trial Strategy

[Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291](#)

Qualified immunity is designed to allow government officials to avoid the expense and disruption of going to trial, and is not merely a defense to liability.[FN1] When a complaint fails to allege a violation of a clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, the qualified immunity defense provides the defendant with immunity from the burdens of trial as well as defense to liability.[FN2] It specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment.[FN3] It protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority and done without willfulness, malice, or corruption.[FN4] The protection of qualified immunity applies regardless of whether a government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.[FN5]

**Observation:** Qualified immunity is not the law simply to save trouble for the government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was.[FN6]

**Practice Tip:** In some jurisdictions, "qualified immunity" is one of several interchangeable terms, including "quasi-judicial immunity," "discretionary immunity," "official immunity," "discretionary immunity," and "good-faith immunity," describing an affirmative defense for governmental employees sued in their individual capacities.[FN7]

The elements of the qualified immunity defense are: (1) performance of a discretionary function[FN8] (2) in good faith[FN9] (3) within the scope of the employee's authority.[FN10]

**Practice Tip:** A qualified immunity defense is frequently raised in the defense of civil rights actions under [42 U.S.C.A. § 1983](#). The defense protects public officials insofar as their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known.[FN11] The primary goal of qualified immunity to a [section 1983](#) action is to permit government officials to act in areas of legal uncertainty without undue fear of subsequent liability.[FN12]

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.[FN13] Such immunity is usually destroyed by malice, bad faith, or improper purpose.[FN14]

There is authority to the effect that an insurance contract covering public officers or employees may serve to waive the defense of qualified immunity.[\[FN15\]](#)

Qualified immunity only protects public officials from lawsuits brought against them in their individual capacity.[\[FN16\]](#)

**Observation:** Qualified immunity is a question of law to be considered de novo on appeal.[\[FN17\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Following the two-step sequence, in an action in which a plaintiff seeks money damages from government officials who have allegedly violated her constitutional rights, of defining constitutional rights and only then conferring qualified immunity, is sometimes beneficial to clarify the legal standards governing public officials. [Camreta v. Greene, 131 S. Ct. 2020 \(2011\)](#).

Basic thrust of qualified immunity doctrine is to free officials from concerns of litigation, including avoidance of disruptive discovery. [Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 \(2009\)](#).

Under Michigan law, a governmental employee enjoys qualified immunity for intentional torts if: (1) the employee undertook the challenged acts during the course of his employment and was acting, or reasonably believed that he was acting, within the scope of his authority; (2) the employee undertook the challenged acts in good faith or without malice; and (3) the acts were discretionary, rather than ministerial, in nature. [Bletz v. Gribble, 641 F.3d 743 \(6th Cir. 2011\)](#).

A supervising officer will not be individually liable for an otherwise unlawful act of his subordinate if the supervising officer is entitled to qualified immunity. [Parrish v. Ball, 594 F.3d 993 \(8th Cir. 2010\)](#).

There is a presumption that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. [Knowlton v. Shaw, 708 F. Supp. 2d 69 \(D. Me. 2010\)](#).

Because qualified immunity protects a public official sued in her individual capacity from civil damages, qualified immunity is not available to the public entity itself or to an official acting in her official capacity. [Paeth v. Worth Township, 705 F. Supp. 2d 753 \(E.D. Mich. 2010\)](#).

Qualified immunity is only available to government employees sued in their individual capacity. [Strinni v. Mehlville Fire Protection Dist., 681 F. Supp. 2d 1052 \(E.D. Mo. 2010\)](#).

Broad protection afforded by qualified immunity in [§ 1983](#) action gives officials a right, not merely to avoid "standing trial," but also to avoid burdens of such pretrial matters as discovery. [42 U.S.C.A. § 1983. Mata v. Anderson, 760 F. Supp. 2d 1068 \(D.N.M. 2009\)](#).

The "good faith" qualification on the qualified official immunity of a public officer has both an objective and a subjective component; objectively, a court must ask whether the behavior demonstrates a presumptive knowledge of and respect for basic, unquestioned constitutional rights, and subjectively, the court's inquiry is whether the official has behaved with permissible intentions. [Bryant v. Pulaski County Detention Center, 330 S.W.3d 461 \(Ky. 2011\)](#), as modified, (Feb. 25, 2011).

Application of the defense of qualified official immunity rests not on the status or title of the officer or employee, but on the act or function performed. [Haney v. Monsky, 311 S.W.3d 235 \(Ky. 2010\)](#), as corrected, (May 7, 2010).

A governmental employee, when sued in his individual capacity, might assert official immunity as a defense to personal monetary liability, which is well suited for resolution in a motion for summary judgment. [Meneffee v. Medlen](#), 319 S.W.3d 868 (Tex. App. Fort Worth 2010).

**[END OF SUPPLEMENT]**

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[FN1] [Ex parte Madison County Bd. of Education](#), 1 So. 3d 980, 242 Ed. Law Rep. 903 (Ala. 2008).

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[FN2] [Pearson v. Callahan](#), 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); [Johnson v. Fankell](#), 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997).

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[FN3] [Ryder v. U.S.](#), 515 U.S. 177, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995).

- As to absolute immunity generally, see [§ 307](#).

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[FN4] [Murphy v. Bajjani](#), 282 Ga. 197, 647 S.E.2d 54, 221 Ed. Law Rep. 904 (2007).

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[FN5] [Pearson v. Callahan](#), 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

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[FN6] [Will v. Hallock](#), 546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836, 24 A.L.R. Fed. 2d 701 (2006).

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[FN7] [Harrison v. Texas Dept. of Criminal Justice-Institutional Div.](#), 915 S.W.2d 882 (Tex. App. Houston 1st Dist. 1995).

- The concept of "official immunity" has also been called "qualified immunity" or "quasi-judicial immunity." [Burgess v. Jaramillo](#), 914 S.W.2d 246 (Tex. App. Fort Worth 1996).

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[FN8] As to the applicability of qualified immunity to discretionary acts or functions of public officers or employees, see §§ [318](#), [319](#).

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[FN9] [Behrens v. Pelletier](#), 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773, 34 Fed. R. Serv. 3d 1 (1996); [Harlow v. Fitzgerald](#), 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); [Cantu v. Rocha](#), 77 F.3d 795, 107 Ed. Law Rep. 459 (5th Cir. 1996).

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[FN10] [Cantu v. Rocha](#), 77 F.3d 795, 107 Ed. Law Rep. 459 (5th Cir. 1996); [Rich v. Dollar](#), 841 F.2d 1558 (11th Cir. 1988); [Ex parte Sawyer](#), 876 So. 2d 433 (Ala. 2003); [Estate of Logusak ex rel. Logusak v. City of Togiak](#), 185 P.3d 103 (Alaska 2008); [Autry v. Western Kentucky University](#), 219 S.W.3d 713, 219 Ed. Law Rep. 811 (Ky. 2007); [Odom v. Wayne County](#), 482 Mich. 459, 760 N.W.2d 217 (2008); [Burgess v. Jaramillo](#), 914 S.W.2d 246 (Tex. App. Fort Worth 1996); [Amy's Enterprises v. Sorrell](#), 174 Vt. 623, 817 A.2d 612 (2002).

- As to pleadings and proof with regard to official immunity, see §§ [390](#), [392](#).

- As to immunity of public officials from personal liability under federal civil rights statutes, see [Am. Jur. 2d, Civil Rights](#)

[§§ 99, 102.](#)

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[FN11] [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#); [Newell v. Runnels, 407 Md. 578, 967 A.2d 729 \(2009\)](#).

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[FN12] [Hanrahan v. Doling, 331 F.3d 93 \(2d Cir. 2003\)](#).

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[FN13] [Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 \(1987\)](#); [Cantu v. Rocha, 77 F.3d 795, 107 Ed. Law Rep. 459 \(5th Cir. 1996\)](#); [Boyce v. Andrew, 510 F.3d 1333 \(11th Cir. 2007\)](#); [Ahmad v. Department of Correction, 446 Mass. 479, 845 N.E.2d 289 \(2006\)](#); [Connor v. Powell, 162 N.J. 397, 744 A.2d 1158 \(2000\)](#).

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[FN14] [Brown v. Penland Const. Co., Inc., 281 Ga. 625, 641 S.E.2d 522, 217 Ed. Law Rep. 732 \(2007\)](#); [Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 \(1990\)](#).

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[FN15] [§ 306.](#)

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[FN16] [Genas v. State of N.Y. Dept. of Correctional Services, 75 F.3d 825 \(2d Cir. 1996\)](#); [Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324 \(4th Cir. 2009\)](#); [Young Apartments, Inc. v. Town of Jupiter, FL, 529 F.3d 1027 \(11th Cir. 2008\)](#); [Jones v. Lathram, 150 S.W.3d 50 \(Ky. 2004\)](#), as amended, (Sept. 27, 2004) and as amended, (Jan. 31, 2005); [Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 \(2002\)](#); [Dear v. City of Irving, 902 S.W.2d 731 \(Tex. App. Austin 1995\)](#), writ denied, (Feb. 9, 1996).

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[FN17] [E-Z Mart Stores, Inc. v. Kirksey, 885 F.2d 476 \(8th Cir. 1989\)](#).

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63C Am. Jur. 2d Public Officers and Employees § 315

## Public Officers and Employees

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., Eric C. Surette, J.D., Barbara J. Van Arsdale, J.D.

### XI. Liability

#### A. Civil Liability

##### 1. Liability of Public Officers

###### c. Qualified Immunity

[Topic Summary](#) [Correlation Table](#) [References](#)

### § 315. Objective reasonableness standard

#### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

#### Trial Strategy

[Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291](#)

Qualified immunity generally only shields a public officer, performing discretionary functions,[FN1] from activities that do not violate clearly established law or constitutional rights of which a reasonable person would have known,[FN2] or if the public officer had an objectively reasonable belief that his or her acts did not violate a clearly established law or constitutional right.[FN3]

The standard set by the Supreme Court with regard to qualified immunity[FN4] was specifically designed to avoid excessive disruption of government and to permit the resolution of many insubstantial claims on summary judgment.[FN5]

The Supreme Court adopted the criterion of objective legal reasonableness, rather than good faith, in order to permit the defeat of insubstantial claims without resorting to trial.[FN6] Thus, qualified immunity does not depend on an officer's subjective, good faith belief that he or she was not violating clearly established law, but instead the defense hinges on whether that belief was reasonable.[FN7] Despite this, it has sometimes been said that an official acts in "good faith," so as to meet that element of the qualified immunity defense,[FN8] if any reasonably prudent officer could have believed that the conduct was consistent with the plaintiff's rights.[FN9]

### CUMULATIVE SUPPLEMENT

#### Cases:

Determining whether qualified immunity protects a public official is an objective test, in that it does not look to the defendant officials' subjective beliefs concerning the unlawfulness of their conduct; however, a determination of



objective reasonableness will often require examination of the information possessed by the defendant officials. [Lopera v. Town Of Coventry, 640 F.3d 388 \(1st Cir. 2011\)](#).

Qualified immunity is a question of law, but where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability. [McKenna v. Edgell, 617 F.3d 432 \(6th Cir. 2010\)](#).

In adjudicating defense of qualified immunity in *Bivens* action, district courts conduct two-part inquiry which asks whether, taken in light most favorable to party asserting injury, facts alleged show actor's conduct violated constitutional right, and assesses "objective legal reasonableness" of actor's conduct as measured by reference to clearly established law. [Brown v. Short, 729 F. Supp. 2d 125 \(D.D.C. 2010\)](#).

## **[END OF SUPPLEMENT]**

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[\[FN1\] § 318.](#)

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[\[FN2\] Pearson v. Callahan, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\); Berube v. Conley, 506 F.3d 79 \(1st Cir. 2007\); Jones v. Parmley, 465 F.3d 46 \(2d Cir. 2006\); Sampson v. King, 693 F.2d 566 \(5th Cir. 1982\); Dunn v. Matatall, 549 F.3d 348 \(6th Cir. 2008\); Martin v. Russell, 563 F.3d 683 \(8th Cir. 2009\); Levine v. City of Alameda, 525 F.3d 903 \(9th Cir. 2008\); Keylon v. City of Albuquerque, 535 F.3d 1210 \(10th Cir. 2008\); Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 \(1987\); Tucker v. Resha, 648 So. 2d 1187 \(Fla. 1994\); Lamb v. Holmes, 162 S.W.3d 902, 198 Ed. Law Rep. 755 \(Ky. 2005\); Witzke v. City of Bismarck, 2006 ND 160, 718 N.W.2d 586 \(N.D. 2006\); Pruitt v. West Virginia Dept. of Public Safety, 222 W. Va. 290, 664 S.E.2d 175 \(2008\).](#)

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[\[FN3\] Arlio v. Lively, 474 F.3d 46 \(2d Cir. 2007\); Ahlers v. Schebil, 188 F.3d 365, 1999 FED App. 0280P \(6th Cir. 1999\); Kravitz v. Police Dept. of City of Hudson, 285 A.D.2d 716, 728 N.Y.S.2d 267 \(3d Dep't 2001\).](#)

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[\[FN4\] Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\).](#)

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[\[FN5\] Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 \(1986\); McDaniel v. Woodard, 886 F.2d 311 \(11th Cir. 1989\); Molnar v. Care House, 574 F. Supp. 2d 772 \(E.D. Mich. 2008\); Swedlund v. Foster, 2003 SD 8, 657 N.W.2d 39 \(S.D. 2003\).](#)

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[\[FN6\] Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773, 34 Fed. R. Serv. 3d 1 \(1996\).](#)

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[\[FN7\] Keylon v. City of Albuquerque, 535 F.3d 1210 \(10th Cir. 2008\).](#)

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[\[FN8\] § 314.](#)

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[\[FN9\] Cantu v. Rocha, 77 F.3d 795, 107 Ed. Law Rep. 459 \(5th Cir. 1996\).](#)

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Public Officers and Employees

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., Eric C. Surette, J.D., Barbara J. Van Arsdale, J.D.

XI. Liability

A. Civil Liability

1. Liability of Public Officers

c. Qualified Immunity

[Topic Summary](#) [Correlation Table](#) [References](#)

## **§ 316. Objective reasonableness standard—Determination of clearly established law or rights**

### **West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

In setting the applicable standard, the Supreme Court in *Harlow v. Fitzgerald* expressly declined to address the issue of what constitutes "clearly established" law.[\[FN1\]](#) The objective reasonableness of the public officer's acts must be assessed in the light of the legal rules that were clearly established at the time the acts were performed,[\[FN2\]](#) and the information possessed by the official at the time the conduct occurred.[\[FN3\]](#)

**Practice Tip:** On a motion for summary judgment, the court is to determine not only current applicable law, but whether that law was clearly established at the time an action occurred. Proper application of the relevant test also requires a determination whether the showings made by the parties create a genuine issue of material fact as to

whether the defendant actually engaged in conduct that violated clearly established law. Both of these determinations go to questions of law that are subject to de novo review.[FN4]

In the case of the violation of an asserted constitutional right, the courts engage in a two-step process, first asking if a plaintiff has asserted a violation of a constitutional right at all, and then whether that right was clearly established at the time of a defendant's actions.[FN5]

If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his or her conduct.[FN6] However, if the official pleading the defense claims extraordinary circumstances and can prove that he or she neither knew nor should have known the relevant legal standard, the defense should be sustained. Yet again, the defense will turn primarily on objective factors.[FN7]

Under the objective reasonableness standard, the reasonableness of the official's conduct is not measured against the official's actual knowledge of constitutional standards and the probable constitutionality of his or her action, but rather against a relatively uniform level of "presumptive" knowledge of constitutional standards.[FN8] A right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that the act in which he or she is engaging violates that right.[FN9]

## CUMULATIVE SUPPLEMENT

### Cases:

Following the two-step sequence, in an action in which a plaintiff seeks money damages from government officials who have allegedly violated her constitutional rights, of defining constitutional rights and only then conferring qualified immunity, is sometimes beneficial to clarify the legal standards governing public officials. [Camreta v. Greene, 131 S. Ct. 2020 \(2011\)](#).

If a government official violates a § 1983 claimant's constitutional rights, qualified immunity generally turns on the objective reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken. [42 U.S.C.A. § 1983](#). [Miller v. Idaho State Patrol, 150 Idaho 856, 252 P.3d 1274 \(2011\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#); [Garcia by Garcia v. Miera, 817 F.2d 650, 39 Ed. Law Rep. 33 \(10th Cir. 1987\)](#).

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[FN2] [Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 \(1987\)](#); [McSherry v. City of Long Beach, 560 F.3d 1125 \(9th Cir. 2009\)](#); [Nelson v. Salem State College, 446 Mass. 525, 845 N.E.2d 338, 207 Ed. Law Rep. 750, 18 A.L.R.6th 811 \(2006\)](#); [Cassady v. Yellowstone County Montana Sheriff Dept., 2006 MT 217, 333 Mont. 371, 143 P.3d 148 \(2006\)](#); [Porter v. City of Manchester, 151 N.H. 30, 849 A.2d 103 \(2004\)](#).

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[FN3] [Engleman v. Deputy Murray, 546 F.3d 944 \(8th Cir. 2008\)](#); [Franklin v. Fox, 312 F.3d 423 \(9th Cir. 2002\)](#); [Williams v. Houston Firemen's Relief and Retirement Fund, 121 S.W.3d 415 \(Tex. App. Houston 1st Dist. 2003\)](#).

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[\[FN4\] Rich v. Dollar, 841 F.2d 1558 \(11th Cir. 1988\).](#)

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[\[FN5\] Pearson v. Callahan, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\)](#) (two-step process is often appropriate); [Holeman v. City of New London, 425 F.3d 184 \(2d Cir. 2005\)](#); [Reams v. Irvin, 561 F.3d 1258 \(11th Cir. 2009\).](#)

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[\[FN6\] Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#); [Bearden v. Lemon, 475 F.3d 926 \(8th Cir. 2007\)](#); [Copelin-Brown v. New Mexico State Personnel Office, 399 F.3d 1248 \(10th Cir. 2005\).](#)

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[\[FN7\] Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#); [Roska ex rel. Roska v. Sneddon, 437 F.3d 964 \(10th Cir. 2006\)](#); [Cipriani v. Lycoming County Housing Authority, 177 F. Supp. 2d 303 \(M.D. Pa. 2001\)](#); [Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 \(1987\).](#)

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[\[FN8\] Emery v. Holmes, 824 F.2d 143, 8 Fed. R. Serv. 3d 346 \(1st Cir. 1987\)](#); [Rowan County v. Sloas, 201 S.W.3d 469 \(Ky. 2006\)](#), as corrected, (Sept. 26, 2006).

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[\[FN9\] Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 \(1987\)](#); [Parker v. Gerrish, 547 F.3d 1, 27 Fed. R. Serv. 3d 7 \(1st Cir. 2008\)](#); [Bush v. Strain, 513 F.3d 492 \(5th Cir. 2008\)](#); [Dunn v. Matatall, 549 F.3d 348 \(6th Cir. 2008\)](#); [Martin v. Russell, 563 F.3d 683 \(8th Cir. 2009\).](#)

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XI. Liability  
A. Civil Liability  
1. Liability of Public Officers

d. Significance of Type of Conduct or Manner of Performance of Acts or Functions  
(1) In General; Discretionary or Ministerial Acts or Functions

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 317. Generally**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Rather than depending solely on the position, status, or office of a government officer or employee, immunity is justified and defined by the functions involved.<sup>[FN1]</sup> The extent of an immunity afforded a government official is to be determined by the nature of the act at issue.<sup>[FN2]</sup>

While official immunity is generally applied with regard to a public officer's or public employee's discretionary acts or functions,<sup>[FN3]</sup> and not with regard to ministerial acts or functions,<sup>[FN4]</sup> statutes in some states suggest an abrogation of the discretionary/ministerial distinction,<sup>[FN5]</sup> and immunity statutes in some jurisdictions specifically apply immunity under specified conditions without regard to the discretionary or ministerial nature of the conduct in question of the government officer or employee.<sup>[FN6]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

To be entitled to governmental immunity for an intentional tort, under Michigan law, a state actor must establish that he was acting in the course of his employment and at least reasonably believed that he was acting within the scope of his authority, that his actions were discretionary in nature, and that he acted in good faith. [Miller v. Sanilac County, 606 F.3d 240 \(6th Cir. 2010\)](#).

In Ohio, an individual acts "recklessly," as exception to qualified immunity from tort liability, when he does an act or intentionally fails to do an act which is in his duty to other to do, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that his conduct creates an unreasonable risk of recent physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [Ohio R.C. § 2744.03\(A\)\(5, 6\)](#). [Watkins v. New Albany Plain Local Schools, 711 F. Supp. 2d 817 \(S.D. Ohio 2010\)](#).

**[END OF SUPPLEMENT]**

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<sup>[FN1]</sup> [Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 \(1988\)](#); [Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 \(1990\)](#).

[\[FN2\] Schroeder v. St. Louis County, 708 N.W.2d 497 \(Minn. 2006\); Bicknese v. Sutula, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d 289, 175 Ed. Law Rep. 746 \(2003\).](#)

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[\[FN3\] § 318.](#)

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[\[FN4\] § 320.](#)

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[\[FN5\] Bego v. Gordon, 407 N.W.2d 801, 40 Ed. Law Rep. 420 \(S.D. 1987\).](#)

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[\[FN6\] Tallman v. Markstrom, 180 Mich. App. 141, 446 N.W.2d 618 \(1989\).](#)

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

d. Significance of Type of Conduct or Manner of Performance of Acts or Functions

(1) In General; Discretionary or Ministerial Acts or Functions

[Topic Summary](#) [Correlation Table](#) [References](#)

**§ 318. Discretionary acts**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

**Definition:** Whether an act can be characterized as "discretionary," for purposes of official immunity, depends on the degree of reason and judgment required. A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or a course pursued. A "ministerial" function is one of a clerical nature, which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of the act to be performed.[FN1]

Official, or qualified, immunity protects governmental officials or employees from tort liability for the performance of their discretionary functions, within the course of their employment or official duties.[FN2] Such immunity covers both discretionary acts and omissions,[FN3] but not acts or omissions characterized as merely "ministerial." [FN4] The scope of the discretionary decisions, acts, or omissions protected by official immunity is broader than the functions of governing, with official immunity protecting the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level.[FN5]

**Observation:** Under an immunity statute, the statutory terms "quasi-legislative" acts and "quasi-judicial" acts have been recognized as synonymous with "discretionary" acts.[FN6]

**Comment:** In a tort action against a public officer, the court has the responsibility of determining not only whether the officer was engaged in exercising a discretionary function, but also, if he or she was, how extensively this circumstance should work in the officer's defense. There is no single test. Attempts to solve the problem by setting forth a precise definition of "discretionary function" have been less than helpful. The expression is a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it. Instead of looking at the dictionary, therefore, the court must weigh numerous factors and make a measured decision, on the basis of that assessment, both (1) whether the particular activity should be characterized as a discretionary function, and (2) whether the officer engaged in that activity should be entitled to a full or limited immunity, a privilege (to act either on the basis of reasonable belief or of the actual facts), or a finding that he or she was not negligent.[FN7]

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or if it was objectively reasonable to believe that their acts did not violate these clearly established rights.[FN8] When acting in a quasi-judicial or discretionary matter, a public officer or employee is usually given immunity from liability to persons who may be injured as the result of an erroneous or mistaken decision,[FN9] however erroneous his or her judgment may be,[FN10] provided the acts or omissions involved are within the scope of the officer's authority,[FN11] the officer is acting in good faith,[FN12] and without willfulness, malice, or corruption.[FN13]

**Comment:** If the officer's authority is limited to the exercise of a discretionary judgment in good faith, he or she must act in good faith but the officer's judgment is not otherwise subject to question. If the officer's authority is to exercise on the basis of a reasonable determination, the court will pass on whether the decision was reasonable or not, not on whether it was correct. If the act is discretionary, the officer would normally be privileged when acting reasonably and would not be required to have made a correct determination.[FN14]

Official immunity from civil liability for a mistake in judgment extends to errors in the determination of both law[FN15] and fact.[FN16]

## CUMULATIVE SUPPLEMENT

### Cases:

Under Vermont law, lower-level government employees are immune from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority. [Crowell v. Kirkpatrick, 667 F. Supp. 2d 391 \(D. Vt. 2009\)](#).

A "discretionary act" for which State Constitution confers official immunity calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. [Georgia Dept. of Transp. v. Heller, 285 Ga. 262, 674 S.E.2d 914 \(2009\)](#).

Procedures or instructions adequate to cause an official's act to become merely ministerial, such that official immunity does not apply, must be so clear, definite, and certain as merely to require the execution of a relatively simple, specific duty. [Kennedy v. Mathis, 297 Ga. App. 295, 676 S.E.2d 746 \(2009\)](#), cert. denied, (June 29, 2009).

An official's ministerial act to which official immunity does not apply is one which is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty; a discretionary act to which official immunity does apply, on the other hand, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. [Kennedy v. Mathis, 297 Ga. App. 295, 676 S.E.2d 746 \(2009\)](#), cert. denied, (June 29, 2009).

"Discretionary" acts or functions, as would give rise to qualified official immunity, are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. [Haney v. Monsky, 311 S.W.3d 235 \(Ky. 2010\)](#), as corrected, (May 7, 2010).

For purposes of qualified official immunity, "discretion" in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. [Haney v. Monsky, 311 S.W.3d 235 \(Ky. 2010\)](#), as corrected, (May 7, 2010).

### [END OF SUPPLEMENT]

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[FN1] [Southers v. City of Farmington, 263 S.W.3d 603 \(Mo. 2008\)](#), as modified on denial of reh'g, (Sept. 30, 2008).

- As to ministerial acts, see [§ 320](#).

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[FN2] [McLean v. Gordon, 548 F.3d 613 \(8th Cir. 2008\)](#), cert. denied, [2009 WL 959453 \(U.S. 2009\)](#) (applying Missouri law); [Jones v. Cross, 260 S.W.3d 343 \(Ky. 2008\)](#); [Sletten v. Ramsey County, 675 N.W.2d 291 \(Minn. 2004\)](#); [Everitt v. General Elec. Co., 156 N.H. 202, 932 A.2d 831 \(2007\)](#).

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[FN3] [Schmidt v. City of Bella Villa, 557 F.3d 564 \(8th Cir. 2009\)](#) (applying Missouri law); [Barner v. Leeds, 24 Cal. 4th 676, 102 Cal. Rptr. 2d 97, 13 P.3d 704 \(2000\)](#); [Everitt v. General Elec. Co., 156 N.H. 202, 932 A.2d 831 \(2007\)](#).

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[\[FN4\] § 320.](#)

- As to the discretionary or ministerial nature of public officers' and employees' duties, see §§ [228](#) to [230](#).

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[\[FN5\] Everitt v. General Elec. Co., 156 N.H. 202, 932 A.2d 831 \(2007\).](#)

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[\[FN6\] Kara B. by Albert v. Dane County, 198 Wis. 2d 24, 542 N.W.2d 777 \(Ct. App. 1995\), decision aff'd, 205 Wis. 2d 140, 555 N.W.2d 630 \(1996\).](#)

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[\[FN7\] Restatement Second, Torts § 895D](#), comment f.

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[\[FN8\] § 316.](#)

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[\[FN9\] Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\); Nelson v. Spalding County, 249 Ga. 334, 290 S.E.2d 915 \(1982\); Foster v. Percy, 270 Ind. 533, 387 N.E.2d 446 \(1979\); Noffsinger v. Nebraska State Bar Ass'n, 261 Neb. 184, 622 N.W.2d 620 \(2001\); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 \(1976\); Verrill v. Dewey, 130 Vt. 627, 299 A.2d 182 \(1972\); Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 \(1995\).](#)

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[\[FN10\] Cambist Films, Inc. v. Duggan, 475 F.2d 887 \(3d Cir. 1973\); District of Columbia v. Pizzulli, 917 A.2d 620 \(D.C. 2007\); DePalma v. Rosen, 294 Minn. 11, 199 N.W.2d 517 \(1972\); Meinecke v. McFarland, 122 Mont. 515, 206 P.2d 1012 \(1949\).](#)

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[\[FN11\] Moss v. Kopp, 559 F.3d 1155 \(10th Cir. 2009\); Lightfoot v. Floyd, 667 So. 2d 56, 107 Ed. Law Rep. 378 \(Ala. 1995\); Odom v. Wayne County, 482 Mich. 459, 760 N.W.2d 217 \(2008\).](#)

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[\[FN12\] Murray v. Earle, 405 F.3d 278 \(5th Cir. 2005\) \(applying Texas law\); Harrison v. Hardin County Community Unit School Dist. No. 1, 197 Ill. 2d 466, 259 Ill. Dec. 440, 758 N.E.2d 848, 159 Ed. Law Rep. 702 \(2001\); Odom v. Wayne County, 482 Mich. 459, 760 N.W.2d 217 \(2008\); Toto v. Ensuar, 196 N.J. 134, 952 A.2d 463 \(2008\); Joe v. Two 30 Nine Joint Venture, 145 S.W.3d 150 \(Tex. 2004\); Sprague v. Nally, 178 Vt. 222, 2005 VT 85, 882 A.2d 1164 \(2005\).](#)

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[\[FN13\] Hayek v. City of St. Paul, 488 F.3d 1049 \(8th Cir. 2007\) \(applying Minnesota law\); Murphy v. Bajjani, 282 Ga. 197, 647 S.E.2d 54, 221 Ed. Law Rep. 904 \(2007\); Autry v. Western Kentucky University, 219 S.W.3d 713, 219 Ed. Law Rep. 811 \(Ky. 2007\); Bicknese v. Sutula, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d 289, 175 Ed. Law Rep. 746 \(2003\).](#)

- As to willful, malicious, corrupt, reckless, or fraudulent conduct of the officeholder, see [§ 327](#).

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[\[FN14\] Restatement Second, Torts § 895D](#), comment g.

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[\[FN15\] State v. Stanley, 506 P.2d 1284 \(Alaska 1973\); Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 \(1964\).](#)

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[\[FN16\] Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 \(1964\).](#)

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XI. Liability

A. Civil Liability

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(1) In General; Discretionary or Ministerial Acts or Functions

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## **§ 319. Discretionary acts—Effect of amount or nature of discretion or judgment involved**

### **West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

Immunity can only exist where the defendant official is required to exercise some modicum of official discretion.[\[FN1\]](#) However, an act is not necessarily discretionary, for purposes of qualified official immunity, just because the public officer performing it has some discretion with respect to the means or method to be employed.[\[FN2\]](#) Even a ministerial act requires some discretion in its performance.[\[FN3\]](#) Whether an act can be characterized as "discretionary," so as to afford official immunity, depends upon the degree of reason and judgment which is required. A discretionary duty requires a public officer to exercise reason and discretion in determining how or whether an act should be done or

a course pursued.<sup>[FN4]</sup> Some degree of judgment or discretion will not necessarily confer discretionary immunity on an official; the crucial focus is upon the nature of the act.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Sampson v. King, 693 F.2d 566 \(5th Cir. 1982\).](#)

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<sup>[FN2]</sup> [Jones v. Lathram, 150 S.W.3d 50 \(Ky. 2004\)](#), as amended, (Sept. 27, 2004) and as amended, (Jan. 31, 2005).

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<sup>[FN3]</sup> [Texas Dept. of Public Safety v. Cordes, 85 S.W.3d 342 \(Tex. App. Austin 2002\).](#)

- As to ministerial acts generally, see [§ 320](#).

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<sup>[FN4]</sup> [S & W Cabinets, Inc. v. Consolidated School Dist. No. 6 of Jefferson County, 901 S.W.2d 266, 101 Ed. Law Rep. 1230 \(Mo. Ct. App. E.D. 1995\).](#)

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<sup>[FN5]</sup> [Elwood v. Rice County, 423 N.W.2d 671 \(Minn. 1988\).](#)

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§ 320. Ministerial acts

West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

Generally, no immunity exists with regard to conduct of a public officer considered to be ministerial in nature.<sup>[FN1]</sup>

**Definition:** A non-immune "ministerial" act is one where the duty is absolute, certain, and imperative, involving merely the performance of a specific task, and the time, mode, and occasion for its performance are defined with such certainty that nothing remains for the exercise of judgment and discretion.<sup>[FN2]</sup>

**Comment:** If an act of the official involves less in the way of personal decision or judgment, or the matter for which the judgment is required has little bearing of importance on the validity of the act, there is no immunity or privilege. These acts are commonly called "ministerial." Ministerial acts are those done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how, or under what circumstances their acts are to be done. Examples of acts held to be ministerial under ordinary circumstances are—

- the preparation of ballots.
- the registration of voters.
- the recording of documents and filing of papers.
- the care of prisoners.
- the driving of vehicles.
- the repair of highways.
- the collection of taxes.
- the taking of acknowledgments.
- the dipping of sheep.

Yet under particular fact circumstances each of these activities may be held to involve the exercise of discretionary decision.<sup>[FN3]</sup>

**Observation:** In at least one jurisdiction, it has been held that, for purposes of qualified immunity, a governmental actor engaged in a purely ministerial activity can nevertheless be performing a discretionary function.<sup>[FN4]</sup> The courts

analyze immunity issues in terms of "state-agent" immunity rather than under the dichotomy of ministerial versus discretionary functions. A state agent acts beyond authority and is therefore not immune when he or she fails to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist.[FN5]

## CUMULATIVE SUPPLEMENT

### Cases:

A "ministerial act" for which State Constitution confers no immunity to public officials is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. [Georgia Dept. of Transp. v. Heller, 285 Ga. 262, 674 S.E.2d 914 \(2009\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Perez v. Oakland County, 466 F.3d 416, 2006 FED App. 0382P \(6th Cir. 2006\)](#), cert. denied, [128 S. Ct. 166, 169 L. Ed. 2d 33 \(2007\)](#); [Dennen v. City of Duluth, 350 F.3d 786 \(8th Cir. 2003\)](#); [District of Columbia v. Jones, 919 A.2d 604 \(D.C. 2007\)](#); [Georgia Dept. of Transp. v. Heller, 285 Ga. 262, 674 S.E.2d 914 \(2009\)](#); [Rowan County v. Sloas, 201 S.W.3d 469 \(Ky. 2006\)](#), as corrected, (Sept. 26, 2006); [Southers v. City of Farmington, 263 S.W.3d 603 \(Mo. 2008\)](#), as modified on denial of reh'g, (Sept. 30, 2008).

- As to the distinction between ministerial and discretionary duties of public officers, see §§ [228](#) to [230](#).

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[FN2] [K.L. v. Hinickle, 144 Wis. 2d 102, 423 N.W.2d 528 \(1988\)](#).

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[FN3] [Restatement Second, Torts § 895D](#), comment h.

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[FN4] [Verret v. Alabama Dept. of Mental Health, 511 F. Supp. 2d 1166 \(M.D. Ala. 2007\) \(applying Alabama law\)](#).

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[FN5] [Feagins v. Waddy, 978 So. 2d 712, 231 Ed. Law Rep. 986 \(Ala. 2007\)](#).

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**§ 321. Determination whether an act is discretionary or ministerial**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The determination as to whether an official has acted in his or her discretion or capacity, and therefore is entitled to immunity, is not subject to a fixed, invariable rule, but instead requires a discerning inquiry into whether the contributions of immunity to effective government in the particular context outweigh the perhaps recurring harm to individual citizens.<sup>[FN1]</sup> The decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case after weighing such factors as—

- the nature of the official's duties.

- the extent to which the acts involve policymaking or the exercise of professional expertise and judgment.

- the likely consequences of withholding immunity.<sup>[FN2]</sup>

The Restatement has set out several factors that may be considered in determining whether a function is discretionary or ministerial:

(1) the nature and importance of the function that the officer is performing, i.e., how important to the public is it that this function be performed, and performed correctly;

(2) the extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government;

(3) the extent to which the imposition of liability would impair the free exercise of discretion by the officer;

- (4) the extent to which the ultimate financial responsibility will fall on the officer;
- (5) the likelihood that harm will result to members of the public if the action is taken;
- (6) the nature and seriousness of the type of harm that may be produced; and
- (7) the availability to the injured party of other remedies and other forms of relief.[\[FN3\]](#)

The view has also been expressed that the distinction between discretionary and ministerial acts is often one of degree,[\[FN4\]](#) since any official act that is ministerial will still require the actor to use some discretion in its performance.[\[FN5\]](#) Also, under particular circumstances, even a task or function usually considered ministerial—for example, the preparation of ballots, voter registration, highway repair, the recording of documents, the filing of papers—may actually involve the exercise of discretion; thus, there is a need to apply the relevant factors on a case-by-case basis.[\[FN6\]](#) A significant aspect of the process of determining whether the act is ministerial or discretionary involves searching for a law or regulation controlling the acts of the officer in a particular situation.[\[FN7\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Whether the act of a public official is ministerial or discretionary is determined by the facts of each individual case, particularly the facts specifically relevant to the official's act or omission from which the alleged liability arises.

[Grammens v. Dollar, 287 Ga. 618, 697 S.E.2d 775, 259 Ed. Law Rep. 254 \(2010\).](#)

Whether a public official's acts upon which liability is predicated are ministerial or discretionary, for purposes of determining whether official immunity applies to the act, is determined by the facts of the particular case, and it depends on the character of the specific actions complained of, not the general nature of the job. West's [Ga.Const. Art. 1, § 2, Par. 9\(d\)](#). [Barnard v. Turner County, 306 Ga. App. 235, 701 S.E.2d 859 \(2010\).](#)

### [END OF SUPPLEMENT]

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[\[FN1\] Davis v. Knud-Hansen Memorial Hospital, 635 F.2d 179 \(3d Cir. 1980\); Davis v. Little, 362 So. 2d 642 \(Miss. 1978\).](#)

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[\[FN2\] Kanagawa v. State By and Through Freeman, 685 S.W.2d 831 \(Mo. 1985\).](#)

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[\[FN3\] Restatement Second, Torts § 895D](#), comment f (setting out the factors in greater detail).

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[\[FN4\] Jennings v. Hart, 602 F. Supp. 2d 754 \(W.D. Va. 2009\) \(applying Virginia law\); Southers v. City of Farmington, 263 S.W.3d 603 \(Mo. 2008\), as modified on denial of reh'g, \(Sept. 30, 2008\); Loran v. Iszler, 373 N.W.2d 870 \(N.D. 1985\); Burgess v. Jaramillo, 914 S.W.2d 246 \(Tex. App. Fort Worth 1996\).](#)

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[\[FN5\] Texas Dept. of Public Safety v. Cordes, 85 S.W.3d 342 \(Tex. App. Austin 2002\).](#)

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[\[FN6\] Loran v. Iszler, 373 N.W.2d 870 \(N.D. 1985\).](#)

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[\[FN7\] Burgess v. Jaramillo, 914 S.W.2d 246 \(Tex. App. Fort Worth 1996\).](#)

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## **§ 322. Unconstitutional conduct**

### **West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

While absolute immunity may be accorded under limited circumstances,[\[FN1\]](#) the courts long have recognized a limited immunity from personal liability for unconstitutional conduct, applicable to many classes of public officials who are required to exercise discretion in the course of their responsibilities.[\[FN2\]](#) Such immunity is necessary because the imposition of monetary costs for mistakes that were not unreasonable in the light of all the circumstances would



undoubtedly deter the most conscientious governmental decisionmaker from exercising his or her judgment independently, forcefully, and in a manner best serving the long-term interest of the public.[FN3]

On the other hand, violation of clearly established constitutional rights of which the government officer or employee should have been aware gives rise to liability.[FN4] Victims of a constitutional violation by a federal agent have a right to recover damages against the official in a federal court despite the absence of any statute conferring such a right.[FN5] Thus, for example, violation of the Fourth Amendment's command against unreasonable searches and seizures by a federal agent acting under color of federal authority gives rise to a federal cause of action against the agent for money damages consequent upon the agent's unconstitutional conduct.[FN6]

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[FN1] [Moore v. Schlesinger, 150 F. Supp. 2d 1308 \(M.D. Fla. 2001\)](#).

- As to absolute immunity generally, see §§ [307](#), [308](#).

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[FN2] [Atcherson v. Siebenmann, 605 F.2d 1058 \(8th Cir. 1979\)](#).

- As to immunity of public officials from personal liability under federal civil rights statutes, see [Am. Jur. 2d, Civil Rights §§ 99, 102](#).

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[FN3] [Atcherson v. Siebenmann, 605 F.2d 1058 \(8th Cir. 1979\)](#).

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[FN4] §§ [310](#), [316](#).

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[FN5] [Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 \(2006\)](#).

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[FN6] [Am. Jur. 2d, Searches and Seizures § 313](#).

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§ 323. Nonfeasance or misfeasance

West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1353 to 1360, 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 110, 113 to 118

**Definition:** While it has been stated that the distinction drawn by the courts between what is misfeasance and what is nonfeasance is not always clear,[FN1] "misfeasance" is the negligent or improper doing of an act, as opposed to "nonfeasance," which involves the negligent failure or omission to act.[FN2]

A public officer engaged wholly in the performance of public duties is personally liable only for his or her own acts of misfeasance.[FN3] Additionally, in some jurisdictions, a public officer can be liable only for the consequences of his or her own misfeasance in connection with a ministerial matter.[FN4] In other jurisdictions, however, a public officer who knowingly or negligently[FN5] fails or refuses to perform a ministerial act[FN6] which the law or legal authority absolutely requires him or her to do, may be compelled to respond in damages to one to whom performance was owing, to the extent of the injury proximately caused by the nonperformance.[FN7] In such a case, the officer is liable as well for nonfeasance as for misfeasance or malfeasance.[FN8]

As a general rule, good faith and absence of malice constitute no defense in an action to hold a ministerial officer liable for damages caused by nonfeasance or misfeasance,[FN9] for an officer is under a constant obligation to discharge the duties of office, and it is not necessary to show that failure to act was willful or malicious.[FN10]

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[FN1] [Cantwell v. University of Massachusetts](#), 551 F.2d 879 (1st Cir. 1977).

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[FN2] [Narine v. Powers](#), 400 Mass. 343, 509 N.E.2d 905 (1987).

- As to liability of public officers or employees for negligent conduct generally, see §§ [324](#), [326](#).

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[\[FN3\] Cantwell v. University of Massachusetts, 551 F.2d 879 \(1st Cir. 1977\).](#)

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[\[FN4\] Narine v. Powers, 400 Mass. 343, 509 N.E.2d 905 \(1987\).](#)

- While the execution of a facially valid, though erroneously issued, warrant is not sufficient to foist liability upon the executing officer, the immunity is not absolute, and will not shield an officer who, because of his misfeasance, has stepped outside the scope of his authority. [Rossi v. City of Amsterdam, 274 A.D.2d 874, 712 N.Y.S.2d 79 \(3d Dep't 2000\).](#)

- As to the effect on liability or immunity of a public officer or employee of the act's or function's nature as ministerial, see [§ 320](#).

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[\[FN5\] Vance v. Hale, 156 Tenn. 389, 2 S.W.2d 94, 57 A.L.R. 1029 \(1928\).](#)

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[\[FN6\] Larson v. Marsh, 144 Neb. 644, 14 N.W.2d 189, 153 A.L.R. 101 \(1944\).](#)

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[\[FN7\] Industrial Commission v. Superior Court In and For Pima County, 5 Ariz. App. 100, 423 P.2d 375 \(1967\); Lehan v. Greigg, 257 Iowa 823, 135 N.W.2d 80 \(1965\); Yanero v. Davis, 65 S.W.3d 510, 161 Ed. Law Rep. 1058 \(Ky. 2001\); Tucker v. Edwards, 214 La. 560, 38 So. 2d 241 \(1948\).](#)

- As to the requirement that the public officer or employee owe a duty to the particular individual, rather than to the public generally, for liability to attach, see §§ [329](#), [330](#).

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[\[FN8\] Yanero v. Davis, 65 S.W.3d 510, 161 Ed. Law Rep. 1058 \(Ky. 2001\).](#)

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[\[FN9\] Lehan v. Greigg, 257 Iowa 823, 135 N.W.2d 80 \(1965\); Babb v. Moore, 374 S.W.2d 516 \(Ky. 1964\).](#)

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[\[FN10\] Babb v. Moore, 374 S.W.2d 516 \(Ky. 1964\).](#)

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**§ 324. Negligence in performance of discretionary acts**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

A public officer is generally not liable for negligence in the performance of discretionary acts in furtherance of his or her official duties.<sup>[FN1]</sup> Official immunity does not deny the existence of a public officer's tort or negate a duty; rather, it provides that the officer will not be liable for damages caused by his or her negligence.<sup>[FN2]</sup>

**Practice Tip:** Because negligence by a public official in performing ministerial duties often is actionable,<sup>[FN3]</sup> the issue frequently arises in official immunity cases as to whether the public official was engaged in discretionary or ministerial conduct when the alleged negligence occurred.<sup>[FN4]</sup>

In some jurisdictions, public employees have immunity for their discretionary acts, even those constituting breaches of an actionable duty, unless a statute provides otherwise.<sup>[FN5]</sup> Under some state statutes, public employees acting within the scope of their duties do not enjoy absolute immunity from suit for any and all wrongs they commit, and are not immune with regard to certain specified torts, primarily involving negligent conduct by public employees acting within the scope of their employment.<sup>[FN6]</sup>

In some jurisdictions, public employees may be subjected to liability for mere negligence in the performance of their jobs, while public officers or officials may not.<sup>[FN7]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Doctrine of "official immunity" provides that a public officer or employee may be personally liable for his negligent ministerial acts, but he may not be held liable for his discretionary acts unless such acts are wilful, wanton, or outside the scope of his authority; the rationale for official immunity is to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight. West's [Ga.Code Ann. § 31-11-8](#). [Polk County v. Ellington](#), 306 Ga. App. 193, 702 S.E.2d 17 (2010).

Doctrine of official immunity provides that although a public officer or employee may be held personally liable for his negligent ministerial acts, he may not be held liable for his discretionary acts unless such acts are wilful, wanton, or outside the scope of his authority. [Kennedy v. Mathis, 297 Ga. App. 295, 676 S.E.2d 746 \(2009\)](#), cert. denied, (June 29, 2009).

The negligent performance of a ministerial act by an official or employee enjoys no immunity, and a governmental agency enjoys no immunity if it is performing a proprietary, rather than governmental, function. [Nelson County Bd. of Educ. v. Forte, 337 S.W.3d 617, 267 Ed. Law Rep. 387 \(Ky. 2011\)](#).

In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the Governmental Tort Claims and Insurance Reform Act and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer. [West's Ann.W.Va.Code, 29-12A-1. Hess v. West Virginia Div. of Corrections, 705 S.E.2d 125 \(W. Va. 2010\)](#).

#### [END OF SUPPLEMENT]

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[FN1] [Stiebitz v. Mahoney, 144 Conn. 443, 134 A.2d 71 \(1957\)](#); [Mora v. State, 68 Ill. 2d 223, 12 Ill. Dec. 161, 369 N.E.2d 868 \(1977\)](#); [Smith v. Danielczyk, 400 Md. 98, 928 A.2d 795 \(2007\)](#); [Southers v. City of Farmington, 263 S.W.3d 603 \(Mo. 2008\)](#), as modified on denial of reh'g, (Sept. 30, 2008); [Everitt v. General Elec. Co., 156 N.H. 202, 932 A.2d 831 \(2007\)](#); [Jensen v. Anderson County Dept. of Social Services, 304 S.C. 195, 403 S.E.2d 615 \(1991\)](#); [Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 \(1995\)](#).

- As to governmental tort liability generally, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.](#)

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[FN2] [Davis v. Lambert-St. Louis Intern. Airport, 193 S.W.3d 760 \(Mo. 2006\)](#).

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[FN3] [Autry v. Western Kentucky University, 219 S.W.3d 713, 219 Ed. Law Rep. 811 \(Ky. 2007\)](#).

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[FN4] [Murray v. Leyshock, 915 F.2d 1196 \(8th Cir. 1990\)](#).

- As to liability of public officers or employees for ministerial acts, see [§ 326](#).

- As to the distinction, for purposes of official immunity of discretionary and ministerial acts or functions of public officers or employees, see §§ [318](#) to [321](#).

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[FN5] [Caldwell v. Montoya, 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320, 101 Ed. Law Rep. 1154 \(1995\)](#).

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[FN6] [§ 307](#).

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[FN7] [James v. Prince George's County, 288 Md. 315, 418 A.2d 1173 \(1980\)](#); [Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 \(1990\)](#) (recognizing distinction).

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## **§ 325. Negligence in performance of discretionary acts—Gross negligence**

### **West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

West's Key Number Digest, [Officers and Public Employees](#) [113](#) to [118](#)

Public officers exercising discretionary powers in some jurisdictions may be held liable for gross negligence, and not ordinary negligence.<sup>[FN1]</sup> Under a statutory provision providing for liability in cases of gross negligence, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.<sup>[FN2]</sup> However, under statutes that extend immunity from personal liability for simple or ordinary negligence, it is not material whether the negligence constituted gross negligence.<sup>[FN3]</sup>

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[FN1] [DeVatt v. Lohenitz](#), 338 F. Supp. 2d 588 (E.D. Pa. 2004) (gross negligence or arbitrariness that shocks the conscience); [Justus v. County of Buchanan](#), 517 F. Supp. 2d 810 (W.D. Va. 2007) (applying Virginia law); [State ex rel. Golden v. Crawford](#), 165 S.W.3d 147 (Mo. 2005).

- As to gross negligence generally, see [Am. Jur. 2d, Negligence §§ 227 to 238](#).

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[FN2] [Tallman v. Markstrom](#), 180 Mich. App. 141, 446 N.W.2d 618 (1989).

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[FN3] [McNamara v. Honeyman](#), 406 Mass. 43, 546 N.E.2d 139 (1989) (statute silent as to gross negligence; claim qualifies as "negligent or wrongful act or omission" under the applicable provision).

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**§ 326. Negligence in performance of ministerial acts**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) [1372](#) to [1376\(10\)](#)

An officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial duty or act, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts,[\[FN1\]](#) or negligently fails to perform ministerial acts imposed by law or legal authority,[\[FN2\]](#) unless the wrong done is a violation of a duty that he or she owes solely to the public.[\[FN3\]](#) There is some authority for the view that immunity from liability may apply for the negligence of public employees who are required to make nonpolicy or ministerial decisions where the decisionmaking involves highly technical considerations.[\[FN4\]](#)

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[\[FN1\]](#) [James ex rel. James v. Friend](#), 458 F.3d 726 (8th Cir. 2006) (applying Missouri law); [Georgia Dept. of Transp. v. Heller](#), 285 Ga. 262, 674 S.E.2d 914 (2009); [Jones v. Cross](#), 260 S.W.3d 343 (Ky. 2008); [James v. Prince George's County](#), 288 Md. 315, 418 A.2d 1173 (1980); [Valdez v. Gonzales](#), 50 N.M. 281, 176 P.2d 173 (1946); [Movable Homes, Inc. v. City of North Tonawanda](#), 56 A.D.2d 718, 392 N.Y.S.2d 772 (4th Dep't 1977); [Lodl v. Progressive Northern Insurance Co.](#), 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314 (2002).

- As to the effect on liability of the discretionary or ministerial nature of the act or function of a public officer or employee, see §§ [318](#), [321](#).

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[\[FN2\]](#) [Lodl v. Progressive Northern Insurance Co.](#), 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314 (2002); [Oyler v. State](#), 618 P.2d 1042 (Wyo. 1980).

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[\[FN3\]](#) [Rupp v. Bryant](#), 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 (Fla. 1982); [Moore v. Cook](#), 22 Ill. App. 2d 48, 159 N.E.2d 496 (4th Dist. 1959); [Valdez v. Gonzales](#), 50 N.M. 281, 176 P.2d 173 (1946).

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[\[FN4\]](#) [Stevenson v. State Dept. of Transp.](#), 290 Or. 3, 619 P.2d 247 (1980), reasoning that the traditional rationale for governmental immunity—the public interest in encouraging employees to exercise their expert judgment freely—may be applicable to employees performing highly technical functions, whether or not such functions involve policy decisions.

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**§ 327. Intentional torts**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

In some jurisdictions, the degree of culpability, and the nature of the tortious conduct, are not relevant considerations to the availability of immunity.<sup>[FN1]</sup> Thus, immunity from personal liability for acts performed within the scope of official authority has sometimes been extended to officers acting maliciously or from other corrupt motives.<sup>[FN2]</sup> Generally, however, public employees may be liable for,<sup>[FN3]</sup> and public official immunity is not a defense with regard to,<sup>[FN4]</sup> the commission of intentional torts. Statutes granting immunity from tort liability to certain public officials sometimes specifically provide that they do not apply to intentional torts committed by such officials.<sup>[FN5]</sup> Under the doctrine of official immunity, a public official charged by law with duties that call for the exercise of judgment or discretion is often personally liable to an individual for damages if guilty of a willful or malicious wrong.<sup>[FN6]</sup> Immunity often does not apply to the discretionary acts of public officers or employees that are performed willfully, with malice, or with corrupt motives.<sup>[FN7]</sup> In addition, a public official may be found liable because of participation in a custom that leads to a violation of constitutional rights, or by acting with deliberate indifference to the constitutional rights of others.<sup>[FN8]</sup>

**Definition:** The traditional formulation of "willful misconduct," for purposes of the exception to public employee immunity, has required a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences.<sup>[FN9]</sup>

**Observation:** Public officers cannot be deemed to act maliciously when they enforce a court order that is valid on its face.<sup>[FN10]</sup>

**Caution:** Despite the general enunciations by the courts of the rule excepting, inter alia, malicious conduct from the protection of official immunity, under the standard of the United States Supreme Court in *Harlow v. Fitzgerald*,<sup>[FN11]</sup> an

allegation of malice has been said not to be sufficient to defeat immunity if the defendant acted in an objectively reasonable manner.[\[FN12\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

In context of official immunity under Georgia law, "actual malice" requires deliberate intention to do wrong and denotes express malice or malice in fact. West's [Ga.Const. Art. 1, § 2, Par. 9](#). [Lavassani v. City of Canton, Ga., 760 F. Supp. 2d 1346 \(N.D. Ga. 2010\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] § 295](#).

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[\[FN2\] Kelley v. Dunne, 344 F.2d 129 \(1st Cir. 1965\); Rosenthal v. Vogt, 229 Cal. App. 3d 69, 280 Cal. Rptr. 1 \(2d Dist. 1991\); Cristo Bros., Inc. v. Troy Urban Renewal Agency, 116 A.D.2d 793, 497 N.Y.S.2d 183 \(3d Dep't 1986\)](#), order aff'd, [68 N.Y.2d 819, 507 N.Y.S.2d 619, 499 N.E.2d 873 \(1986\)](#) (when official action involves the exercise of discretion, the officer is not liable for the injurious consequence of that action even if resulting from malice); [Mills v. Smith, 1960 OK 193, 355 P.2d 1064, 82 A.L.R.2d 1144 \(Okla. 1960\)](#).

- As to the definition of the term "malice" generally, see Am. Jur. 2d, Malice §§ 1, 2.

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[\[FN3\] Kalloo v. Englerth, 433 F. Supp. 504 \(D.V.I. 1977\)](#) (private individual subjected to malicious actions of government official should be compensated for injuries suffered regardless of whether official's conduct rose to constitutional dimensions); [Spring v. Geriatric Authority of Holyoke, 394 Mass. 274, 475 N.E.2d 727 \(1985\)](#).

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[\[FN4\] Ashton v. Brown, 339 Md. 70, 660 A.2d 447 \(1995\); Hawkins v. State, 117 N.C. App. 615, 453 S.E.2d 233 \(1995\)](#).

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[\[FN5\] Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 \(1989\)](#).

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[\[FN6\] Board of Examiners of Certified Shorthand Reporters Through Juge v. Neyrey, 542 So. 2d 56 \(La. Ct. App. 4th Cir. 1989\)](#), writ denied, [548 So. 2d 1231 \(La. 1989\)](#); [Elwood v. Rice County, 423 N.W.2d 671 \(Minn. 1988\)](#); [McCloud v. Bradley, 724 S.W.2d 362 \(Tenn. Ct. App. 1986\)](#).

- Alleged malice on part of high-school principal, assistant principal, and school nurse regarding purported failure to provide immediate medical care to student did not constitute "actual malice" and thus was insufficient to overcome official immunity for discretionary acts; alleged malice involved deliberate acts of wrongdoing done with reckless disregard for the safety of others, not done with deliberate intention to do wrong. [Murphy v. Bajjani, 282 Ga. 197, 647 S.E.2d 54, 221 Ed. Law Rep. 904 \(2007\)](#).

- As to the availability of relief with regard to the exercise of public officials' discretion with regard to the issuance of licenses generally, see [Am. Jur. 2d, Licenses and Permits § 58](#).

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[FN7] [Kiesau v. Bantz](#), 686 N.W.2d 164 (Iowa 2004); [Duncan v. Koustenis](#), 260 Md. 98, 271 A.2d 547 (1970); [Susla v. State](#), 311 Minn. 166, 247 N.W.2d 907 (1976); [Southers v. City of Farmington](#), 263 S.W.3d 603 (Mo. 2008), as modified on denial of reh'g, (Sept. 30, 2008); [Scot Lad Foods, Inc. v. Secretary of State](#), 66 Ohio St. 2d 1, 20 Ohio Op. 3d 1, 418 N.E.2d 1368, 31 U.C.C. Rep. Serv. 371 (1981); [Pruitt v. West Virginia Dept. of Public Safety](#), 222 W. Va. 290, 664 S.E.2d 175 (2008); [Barillari v. City of Milwaukee](#), 194 Wis. 2d 247, 533 N.W.2d 759 (1995).

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[FN8] [Diaz v. Martinez](#), 112 F.3d 1 (1st Cir. 1997).

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[FN9] [Leang v. Jersey City Bd. of Educ.](#), 28 I.E.R. Cas. (BNA) 72, 2009 WL 1058341 (N.J. 2009).

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[FN10] [State ex rel. Jacobs v. Sherard](#), 36 N.C. App. 60, 243 S.E.2d 184 (1978).

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[FN11] [Harlow v. Fitzgerald](#), 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

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[FN12] [Malley v. Briggs](#), 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

- As to the objective reasonableness standard in determining the applicability of qualified immunity, see [§ 316](#).

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**§ 328. Intentional torts—Effect on absolute immunity**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1372 to 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 113 to 118

The view is sometimes followed that, unlike qualified immunity,[FN1] absolute immunity from tort liability stands even if the official acts in bad faith[FN2] or maliciously or corruptly.[FN3] However, in some jurisdictions, the rule is that public officers are absolutely immune from liability for discretionary acts absent a showing of malice or corruption[FN4] or willfulness.[FN5] In this regard, the scope of certain federal officials' absolute immunity from common-law torts liability[FN6] is such that it cannot be defeated by allegations or proof of deliberate malice on the part of the federal official so charged, as long as the conduct in question falls within the outer perimeter of the official's line of duty.[FN7] However, absolute immunity is not applicable for all federal officials, in all circumstances.[FN8]

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[FN1] § 328.

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[FN2] [Broudy v. Mather](#), 366 F. Supp. 2d 3 (D.D.C. 2005), decision aff'd, 460 F.3d 106 (D.C. Cir. 2006); [Mandel v. O'Hara](#), 320 Md. 103, 576 A.2d 766 (1990).

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[FN3] [Bailey v. Kennedy](#), 349 F.3d 731 (4th Cir. 2003) (applying North Carolina law); [Ex parte City of Greensboro](#), 948 So. 2d 540 (Ala. 2006).

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[FN4] [Jones v. Kearns](#), 120 N.C. App. 301, 462 S.E.2d 245 (1995).

- For discussion of allegations and proof of malice or corruption in this regard, see §§ [390](#) to [392](#).

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[FN5] [Clarke v. Township of Mount Laurel](#), 357 N.J. Super. 362, 815 A.2d 502 (App. Div. 2003); [Musso-Escude v. Edwards](#), 101 Wash. App. 560, 4 P.3d 151 (Div. 1 2000).

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[FN6] As to immunity as to such torts, generally, see [§ 310](#).

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[FN7] [Ricci v. Key Bancshares of Maine, Inc.](#), 768 F.2d 456 (1st Cir. 1985).

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[\[FN8\] § 310.](#)

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## § 329. Public duty doctrine

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [119](#)

Under the public duty doctrine, official misconduct can constitute an individual wrong only if the duty involved is owed to the party seeking redress.[\[FN1\]](#) A public employee may not be held civilly liable for breach of a duty owed to the general public, as distinguished from a duty owed to particular individuals.[\[FN2\]](#) To hold a public official civilly liable for violating a duty owed to the public at large would subject the official to potential liability for every action undertaken and would not be in society's best interest.[\[FN3\]](#) Thus, a failure to perform a public duty, or an inadequate or erroneous performance, is generally a public and not an individual injury, for which an official has immunity from lawsuits.[\[FN4\]](#)

**Caution:** The public duty doctrine has been abandoned in some jurisdictions.[\[FN5\]](#)

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[FN1] [Tcherepnin v. Franz](#), 570 F.2d 187 (7th Cir. 1978); [Griffin v. Rogers](#), 232 Kan. 168, 653 P.2d 463 (1982).

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[FN2] [Southers v. City of Farmington](#), 263 S.W.3d 603 (Mo. 2008), as modified on denial of reh'g, (Sept. 30, 2008); [Jensen v. Anderson County Dept. of Social Services](#), 304 S.C. 195, 403 S.E.2d 615 (1991).

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[FN3] [Marshall v. Winston](#), 239 Va. 315, 389 S.E.2d 902 (1990).

- For discussion of the "public duty" rule, see [§ 241](#).

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[FN4] [Shore v. Town of Stonington](#), 187 Conn. 147, 444 A.2d 1379 (1982); [Jacobson v. McMillan](#), 64 Idaho 351, 132 P.2d 773 (1943); [Sawicki v. Village of Ottawa Hills](#), 37 Ohio St. 3d 222, 525 N.E.2d 468 (1988); [Johnson v. Campbell](#), 142 S.W.3d 592 (Tex. App. Texarkana 2004) (even illegal acts protected).

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[FN5] [Adams v. State](#), 555 P.2d 235 (Alaska 1976); [Ryan v. State](#), 134 Ariz. 308, 656 P.2d 597, 38 A.L.R.4th 1188 (1982); [Martinez v. City of Lakewood](#), 655 P.2d 1388 (Colo. App 1982); [Commercial Carrier Corp. v. Indian River County](#), 371 So. 2d 1010 (Fla. 1979); [Faulkner v. The McCarty Corp.](#), 853 So. 2d 24 (La. Ct. App. 4th Cir. 2003); [Brennen v. City of Eugene](#), 285 Or. 401, 591 P.2d 719 (1979).

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**§ 330. Public duty doctrine—Exceptions**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 110 to 119

Several exceptions to the public duty doctrine<sup>[FN1]</sup> are recognized by the courts. Among those exceptions is the "special duty" exception, under which a public official or employee may be liable if a duty is owed to a specific identifiable person or class of persons rather than to the public only.<sup>[FN2]</sup> A private citizen must show the existence of a duty particular to him or her, as distinct from a duty owed to the public in general, in order to be entitled to bring suit under this exception.<sup>[FN3]</sup> At times, a legislative enactment evidences an intent to identify and protect a particular and circumscribed class of persons, which can give rise to a special duty.<sup>[FN4]</sup>

Another exception to the public duty doctrine, in some jurisdictions, has been called the "failure to enforce" exception. This exception recognizes that a general duty of care owed to the public can be owed to an individual where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute is intended to protect.<sup>[FN5]</sup> The determination whether the failure to enforce exception applies involves a question of fact: whether the governmental agent responsible for enforcing statutory requirements possessed actual knowledge of the statutory violation.<sup>[FN6]</sup>

There is an exception to the public duty doctrine that occurs when a "special relationship" exists between a public agency and any reasonably foreseeable plaintiff such that the plaintiff is in a position different from the general public and the plaintiff relies on assurances explicitly given by the agency.<sup>[FN7]</sup>

Reckless conduct by a public employee may establish a special relationship with a private citizen and allow the citizen to recover for a breach of duty. This may occur when a public employee is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.<sup>[FN8]</sup> A public officer may thus face liability when he or she is aware of a danger that is of such quality that the public officer's duty to act becomes absolute, certain, and imperative.<sup>[FN9]</sup> The court will permit official liability if the public official's duty to act is so clear and unequivocal that the policy rationale underlying immunity, namely, to encourage municipal officers to exercise judgment, has no force.<sup>[FN10]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Six elements considered in determining existence of special duty depriving public officials of immunity from private suit normally afforded under public duty rule are: essential purpose of statute is to protect against particular kind of

harm; statute directly or indirectly imposes on specific public officer duty to guard against or not cause that harm; class of persons statute intends to protect is identifiable before fact; plaintiff is person within protective class; public officer knows or has reason to know likelihood of harm to members of class if he fails to do his duty; and officer is given sufficient authority to act in circumstances or he undertakes to act in exercise of his office. [Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575 \(2010\)](#).

**[END OF SUPPLEMENT]**

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[\[FN1\] § 330](#).

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[\[FN2\] Sawicki v. Village of Ottawa Hills, 37 Ohio St. 3d 222, 525 N.E.2d 468 \(1988\); Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 \(1999\)](#).

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[\[FN3\] Hurd v. Flores, 221 S.W.3d 14 \(Tenn. Ct. App. 2006\); Marshall v. Winston, 239 Va. 315, 389 S.E.2d 902 \(1990\); Noakes v. City of Seattle, 77 Wash. App. 694, 895 P.2d 842 \(Div. 1 1995\)](#).

- For discussion of the determination whether a "special duty" exists under the public duty rule, see [§ 242](#).

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[\[FN4\] Johnson v. State, 77 Wash. App. 934, 894 P.2d 1366, 100 Ed. Law Rep. 351 \(Div. 1 1995\)](#), as amended, (June 20, 1995) (stating that exception cannot arise from implied assurances).

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[\[FN5\] Hurd v. Flores, 221 S.W.3d 14 \(Tenn. Ct. App. 2006\); Waite v. Whatcom County, 54 Wash. App. 682, 775 P.2d 967 \(Div. 1 1989\)](#).

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[\[FN6\] Waite v. Whatcom County, 54 Wash. App. 682, 775 P.2d 967 \(Div. 1 1989\)](#).

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[\[FN7\] Johnson v. State, 77 Wash. App. 934, 894 P.2d 1366, 100 Ed. Law Rep. 351 \(Div. 1 1995\)](#), as amended, (June 20, 1995) (stating that exception cannot arise from implied assurances).

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[\[FN8\] Brown v. Hamilton County, 126 S.W.3d 43 \(Tenn. Ct. App. 2003\)](#).

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[\[FN9\] Barillari v. City of Milwaukee, 194 Wis. 2d 247, 533 N.W.2d 759 \(1995\)](#).

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[\[FN10\] Fleming v. City of Bridgeport, 284 Conn. 502, 935 A.2d 126 \(2007\)](#).

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## § 331. Misrepresentation

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [119](#)

In some jurisdictions, government officers or employees may be held liable for a negligent misrepresentation of fact.<sup>[FN1]</sup> The law in other states, however, immunizes employees of public entities for damages resulting from negligent, and even intentional, misrepresentations made by such employees when the wrongdoing involves interference with financial or commercial interests.<sup>[FN2]</sup> Such immunity applies unless, in addition to the essentials of common law deceit, the employee is motivated by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy, or harm the injured party. The plaintiff must allege actual harm to himself or herself, as opposed to mere generalized harm to the public.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Northernair Productions, Inc. v. Crow Wing County](#), 309 Minn. 386, 244 N.W.2d 279 (1976).

[FN2] [County of Kern v. Sparks](#), 149 Cal. App. 4th 11, 56 Cal. Rptr. 3d 551 (5th Dist. 2007); [Tokeshi v. State of California](#), 217 Cal. App. 3d 999, 266 Cal. Rptr. 255 (2d Dist. 1990).

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[FN3] [Curcini v. County of Alameda](#), 164 Cal. App. 4th 629, 79 Cal. Rptr. 3d 383 (1st Dist. 2008).

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**§ 332. Failure to timely file, or filing of false, financial reports or tax returns**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [119](#)

A public officer may be held personally liable for the payment of tax penalties and interest charges assessed against a public body because of the officer's failure to file tax returns in a timely manner.[FN1] Furthermore, Congress has

prescribed, by statute, financial disclosure requirements applicable to federal personnel.[FN2] The applicable provisions provide for the bringing of civil actions and civil liability for the failure to file or the filing of false reports.[FN3]

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[FN1] [State v. Poindexter, 517 N.E.2d 88 \(Ind. Ct. App. 1987\)](#).

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[FN2] [5 U.S.C.A. App. 4 § 102](#), discussed at [§ 250](#).

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[FN3] [5 U.S.C.A. App. 4 § 104](#), discussed at [§ 407](#)

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**§ 333. Termination of employees, contractors**

**West's Key Number Digest**

West's Key Number Digest, [Civil Rights](#) 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 110 to 119

West's Key Number Digest, [United States](#) 10(4)

## A.L.R. Library

### [Liability of federal government officer or employee for causing discharge or separation of subordinate, 5 A.L.R. Fed. 961](#)

Public officials will normally enjoy qualified immunity in actions for wrongful termination,[[FN1](#)] especially when it is not clearly established that the employee's right not to be terminated for the stated grounds would be wrongful.[[FN2](#)] In particular, if it is not clearly established that an official cannot terminate a person for exercising First Amendment rights, the official will be granted qualified immunity.[[FN3](#)] On the other hand, immunity has been denied where an employee's speech or other rights are constitutionally protected, a fact issue exists as to whether that speech was the cause of the termination, and the constitutional right asserted is clearly established.[[FN4](#)]

It is clearly established that discrimination based on race is prohibited, and a supervisor will not enjoy immunity from a lawsuit for a race-based termination.[[FN5](#)]

A public official enjoys qualified immunity as long as the job in question potentially concerns matters of partisan political interest[[FN6](#)] and involves at least a modicum of policymaking responsibility, access to confidential information, or official communication.[[FN7](#)]

## CUMULATIVE SUPPLEMENT

### Cases:

Human resources director of state department of corrections (DOC) was entitled to qualified immunity from DOC officer's § 1983 claim, which alleged that his application for promotion was intentionally misplaced in retaliation for his union activities in violation of his First Amendment free speech rights; although human resources director was working on date that application was allegedly misplaced, and as a supervisor was in a position to know about such misplacement, there was no evidence that human resources director was personally involved in misplacement of officer's application, or had a motive other than his position to retaliate against officer. [U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983. Justice v. Machtinger, 733 F. Supp. 2d 495 \(D. Del. 2010\).](#)

### [END OF SUPPLEMENT]

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[[FN1](#)] [Hogan v. City of Syracuse, 306 Fed. Appx. 658 \(2d Cir. 2009\).](#)

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[[FN2](#)] [Poirier v. Massachusetts Dept. of Correction, 558 F.3d 92 \(1st Cir. 2009\).](#)

- As to the requirement that a right be clearly established in order to hold a public official liable, see [§ 316](#).

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[[FN3](#)] [Philip v. Cronin, 537 F.3d 26 \(1st Cir. 2008\); Lynch v. City of Boston, 180 F.3d 1, 52 Fed. R. Evid. Serv. 661 \(1st Cir. 1999\)](#) (volunteer terminated after complaining to mayor about program); [James v. Mellen, 305 Fed. Appx. 192 \(5th Cir.](#)

[2008](#)); [Watts v. Florida Intern. University, 495 F.3d 1289, 223 Ed. Law Rep. 147 \(11th Cir. 2007\)](#); [Ziskend v. O'Leary, 79 F. Supp. 2d 10 \(D. Mass. 2000\)](#) (termination of volunteer police officer).

- An officer was entitled to qualified immunity for releasing a police dog, after giving appropriate warnings to a suspect to stop, to apprehend a suspect who had fled from a minor traffic accident. It was not clearly established in 1994 that using a police dog trained in the "bite and hold" method was excessive force, particularly under the existing circumstances. The officer knew that the suspect was also a suspect in a prior robbery, and the officer did not know whether the suspect, who was fleeing through a residential area, was armed. [Jarrett v. Town of Yarmouth, 331 F.3d 140 \(1st Cir. 2003\)](#).

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[FN4] [Back v. Hall, 537 F.3d 552 \(6th Cir. 2008\)](#), cert. denied, [129 S. Ct. 904, 173 L. Ed. 2d 108 \(2009\)](#); [Cameron v. Grainger County, 274 Fed. Appx. 437 \(6th Cir. 2008\)](#) (right to intimate association); [Stodghill v. Wellston School Dist., 512 F.3d 472, 228 Ed. Law Rep. 696 \(8th Cir. 2008\)](#) (due process); [Thomas v. City of Blanchard, 548 F.3d 1317 \(10th Cir. 2008\)](#) (city manager and a supervisor denied immunity).

- Fire department officials were not entitled to qualified immunity in a challenge to the department's affirmative action program, where the case law about which a reasonable official would have known had clearly established by the 1993 and 1994 hiring seasons that the department's affirmative action program failed to satisfy the strict requirements of the equal protection clause. [Alexander v. Estepp, 95 F.3d 312, 168 A.L.R. Fed. 705 \(4th Cir. 1996\)](#).

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[FN5] [Blackwell v. Laque, 275 Fed. Appx. 363 \(5th Cir. 2008\)](#).

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[FN6] [McCloud v. Testa, 97 F.3d 1536, 1996 FED App. 0335P \(6th Cir. 1996\)](#); [Brinston v. Dunn, 928 F. Supp. 669 \(S.D. Miss. 1996\)](#).

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[FN7] [Juarbe-Angueira v. Arias, 831 F.2d 11 \(1st Cir. 1987\)](#).

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63C Am. Jur. 2d Public Officers and Employees § 334

## Public Officers and Employees

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., Eric C. Surette, J.D., Barbara J. Van Arsdale, J.D.

### XI. Liability

#### A. Civil Liability

##### 1. Liability of Public Officers

##### e. Liability as to Particular Matters or Conduct

##### (1) In General

[Topic Summary](#) [Correlation Table](#) [References](#)

### § 334. Termination of employees, contractors—Federal officers and employees

#### West's Key Number Digest

West's Key Number Digest, [Civil Rights](#) 1376(10)

West's Key Number Digest, [Officers and Public Employees](#) 110 to 119

West's Key Number Digest, [United States](#) 10(4)

Federal government officers and employees have generally not been held liable for causing the termination of their subordinates,<sup>[FN1]</sup> regardless of the underlying theories of the suit involved—

— defamation.<sup>[FN2]</sup>

— fraud.<sup>[FN3]</sup>

— fraudulent misrepresentation.<sup>[FN4]</sup>

— intentional infliction of emotional distress.<sup>[FN5]</sup>

— conspiracy.<sup>[FN6]</sup>

— violation of constitutional rights.<sup>[FN7]</sup>

— unauthorized search.<sup>[FN8]</sup>

— interference with economic advantage.<sup>[FN9]</sup>

— interference with the employment contract.<sup>[FN10]</sup>

However, immunity has been denied, subjecting public officers or employees to liability for discharging subordinate employees in certain instances, such as where the supervisor has not acted in good faith and did not have the type of immunity reserved for persons in judicial or quasi-judicial positions.<sup>[FN11]</sup>

#### CUMULATIVE SUPPLEMENT

#### Cases:

Transportation Security Administration (TSA) employee could not assert due process claims against TSA, Department of Homeland Security (DHS), and agency officers in their official capacity under a *Bivens* theory. [U.S.C.A. Const.Amend. 5. Sutera v. Transportation Sec. Admin., 708 F. Supp. 2d 304 \(E.D. N.Y. 2010\).](#)

**[END OF SUPPLEMENT]**

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[FN1] [Vest v. U.S. Dept. of the Interior, 729 F.2d 1284 \(10th Cir. 1984\)](#) (claim covered by extensive scheme provided under Merit Systems Protection Act); [Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255 \(1st Cir. 1987\)](#); [Williams v. Collins, 728 F.2d 721 \(5th Cir. 1984\)](#); [Mandel v. Nouse, 509 F.2d 1031 \(6th Cir. 1975\)](#); [Metz v. McKinley, 583 F. Supp. 683 \(S.D. Ga. 1984\)](#), judgment aff'd, [747 F.2d 709 \(11th Cir. 1984\)](#).

- As to civil service and civil servants, generally, see [Am. Jur. 2d, Civil Service §§ 1 et seq.](#)

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[FN2] [Williams v. Collins, 728 F.2d 721 \(5th Cir. 1984\)](#); [Chafin v. Pratt, 358 F.2d 349 \(5th Cir. 1966\)](#); [Mandel v. Nouse, 509 F.2d 1031 \(6th Cir. 1975\)](#); [Ruderer v. Meyer, 413 F.2d 175 \(8th Cir. 1969\)](#).

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[FN3] [Ward v. Hudnell, 366 F.2d 247, 5 A.L.R. Fed. 955 \(5th Cir. 1966\)](#); [Phillips v. Gregg, 599 F. Supp. 30 \(S.D. Iowa 1984\)](#).

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[FN4] [Richards v. Mileski, 567 F. Supp. 1391 \(D.D.C. 1983\)](#).

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[FN5] [Kannaby v. U.S. Army Corps of Engineers, 53 Fed. Appx. 776 \(7th Cir. 2002\)](#); [Richards v. Mileski, 567 F. Supp. 1391 \(D.D.C. 1983\)](#).

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[FN6] [De Busk v. Harvin, 212 F.2d 143 \(5th Cir. 1954\)](#); [Tripp v. Department of Defense, 173 F. Supp. 2d 58 \(D.D.C. 2001\)](#); [Richards v. Mileski, 567 F. Supp. 1391 \(D.D.C. 1983\)](#); [Metz v. McKinley, 583 F. Supp. 683 \(S.D. Ga. 1984\)](#), judgment aff'd, [747 F.2d 709 \(11th Cir. 1984\)](#).

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[FN7] [Franklin v. Henderson, 15 Fed. Appx. 205 \(6th Cir. 2001\)](#); [M.K. v. Tenet, 99 F. Supp. 2d 12 \(D.D.C. 2000\)](#); [Richards v. Mileski, 567 F. Supp. 1391 \(D.D.C. 1983\)](#).

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[FN8] [Williams v. Collins, 728 F.2d 721 \(5th Cir. 1984\)](#).

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[FN9] [Richards v. Mileski, 567 F. Supp. 1391 \(D.D.C. 1983\)](#).

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[FN10] [Williams v. Collins, 728 F.2d 721 \(5th Cir. 1984\)](#); [Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 284 F.2d 173 \(D.C. Cir. 1960\)](#), judgment aff'd, [367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 \(1961\)](#); [Avitzur v. Davidson, 549 F. Supp. 399 \(N.D. N.Y. 1982\)](#).

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[\[FN11\] Williams v. Trimble, 527 F. Supp. 910 \(S.D. N.Y. 1981\).](#)

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Public Officers and Employees

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

e. Liability as to Particular Matters or Conduct

(1) In General

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**§ 335. Liability for conduct of subordinates**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [118](#)

**A.L.R. Library**

[Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140](#)

As a rule, the doctrine of respondeat superior is inapplicable to public officers,[\[FN1\]](#) so that, generally, officials have no vicarious liability for acts of subordinates in which they are not directly involved, that is, for which they bear no



personal responsibility.[FN2] In the absence of a statute imposing liability, or of negligence on one's part in appointing or supervising assistants,[FN3] an officer is not liable for the default or misfeasance of subordinates and assistants, whether or not appointed by the officer.[FN4] Persons entitled to official immunity cannot be held vicariously liable for the negligence of those employed by them, if they have employed persons of suitable skill[FN5] and engaged in no negligence themselves.[FN6] In a sense, the subordinates or assistants, by virtue of the law and of the appointment, become officers themselves, or servants of the public, as distinguished from servants of the officer.[FN7]

On the other hand, officers may be liable if they directed, participated in, or ratified a tortious act,[FN8] or entirely abdicated their responsibility in regard to a subordinate.[FN9] The rule of qualified liability for a public officer or employee in a supervisory position does not permit an officer or employee to escape the consequences of the defaults and misfeasance of subordinates by ignoring such conduct. In the supervisory role, the employee has a duty to exercise reasonable care to keep informed of the work performance of subordinate employees.[FN10]

Public officers having the custody of public funds or property are generally held liable for losses due to the negligence or misconduct of their subordinates.[FN11]

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[FN1] O'Neill v. Mencher, 21 Mass. App. Ct. 610, 488 N.E.2d 1187 (1986); Schmidt v. Breeden, 134 N.C. App. 248, 517 S.E.2d 171, 136 Ed. Law Rep. 1063 (1999); McCloud v. Bradley, 724 S.W.2d 362 (Tenn. Ct. App. 1986).

[FN2] DuBree v. Com., 481 Pa. 540, 393 A.2d 293 (1978).

- As to liability of municipal officers for acts or omissions of subordinates, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 250.

[FN3] Waters v. Bates, 227 F. Supp. 462 (E.D. Tenn. 1964), judgment aff'd, 344 F.2d 75, 15 A.L.R.3d 1183 (6th Cir. 1965).

[FN4] Franks v. Thompson, 59 F.R.D. 142 (M.D. Ala. 1973); Byrd v. Warden, Federal Detention Headquarters, New York, New York, 376 F. Supp. 37 (S.D. N.Y. 1974); Medina Perez v. Fajardo, 257 F. Supp. 2d 467, 177 Ed. Law Rep. 169 (D.P.R. 2003); Antonis v. Liberati, 821 A.2d 666 (Pa. Commw. Ct. 2003).

[FN5] Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006), as corrected, (Sept. 26, 2006).

[FN6] Teasley v. Forler, 548 F. Supp. 2d 694 (E.D. Mo. 2008), subsequent determination, 2008 WL 877869 (E.D. Mo. 2008); State ex rel. Green v. Neill, 127 S.W.3d 677 (Mo. 2004).

[FN7] Bujaki v. Egan, 237 F. Supp. 822 (D. Alaska 1965); Teasley v. Forler, 548 F. Supp. 2d 694 (E.D. Mo. 2008), subsequent determination, 2008 WL 877869 (E.D. Mo. 2008); Rarick v. DeFrancesco, 94 F. Supp. 2d 279 (N.D. N.Y. 2000); Com. to Use of Orris v. Roberts, 392 Pa. 572, 141 A.2d 393, 71 A.L.R.2d 1124 (1958).

[FN8] Franks v. Thompson, 59 F.R.D. 142 (M.D. Ala. 1973); Williams v. U.S., 353 F. Supp. 1226 (E.D. La. 1973); Middleton v. Pearman, 305 F. Supp. 1203 (D.S.C. 1969); King v. Kidd, 640 A.2d 656 (D.C. 1993) (direct, rather than vicarious,

liability).

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[FN9] [Love v. Sheahan, 156 F. Supp. 2d 749 \(N.D. Ill. 2001\)](#) (allegations that official knew of subordinates' offending conduct but failed to take preventative action sufficient to allege personal liability); [Larson v. Independent School Dist. No. 314, Braham, 289 N.W.2d 112 \(Minn. 1979\)](#) (where high school principal lost potential immunity by entirely abdicating his responsibility to exercise discretion).

- For discussion of school administrative officers generally, see [Am. Jur. 2d, Schools §§ 59 to 79](#).

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[FN10] [Oakes v. West Virginia Dept. of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 \(1980\)](#).

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[FN11] [§ 339](#).

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

e. Liability as to Particular Matters or Conduct

(1) In General

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**§ 336. Contracts**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [114](#), [116](#)

A public officer acting within the scope of his or her authority and in his or her official capacity is generally not personally liable on contracts executed on behalf of the government.[\[FN1\]](#) Where public agents, in good faith, contract with persons having full knowledge of the extent of their authority, or who have equal means of knowledge, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, even though it is found that through ignorance of law they may have exceeded their authority.[\[FN2\]](#)

Although the courts will not enforce an illegal contract with a public officer, in some cases where funds are paid out in execution of an illegal contract, the courts permit the recovery of the funds from the officer on the ground that public interest requires judicial intervention, or that the parties are not equally at fault, or that the defendant will not be permitted to retain funds wrongfully obtained in an official capacity.[\[FN3\]](#) Furthermore, state statutes sometimes provide for liability of public officers for certain conduct in connection with public contracts.[\[FN4\]](#) In particular, statutes may prohibit public officials from having any financial interest in the contract,[\[FN5\]](#) or receiving anything of economic value from a person seeking to obtain a public contract.[\[FN6\]](#)

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[\[FN1\]](#) [Curcini v. County of Alameda](#), 164 Cal. App. 4th 629, 79 Cal. Rptr. 3d 383 (1st Dist. 2008); [Wilson v. Strange](#), 235 Ga. 156, 219 S.E.2d 88 (1975).

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[\[FN2\]](#) [Hailey v. King County](#), 21 Wash. 2d 53, 149 P.2d 823, 154 A.L.R. 351 (1944).

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[\[FN3\]](#) [In re Brown's Estate](#), 147 Kan. 395, 76 P.2d 857, 116 A.L.R. 1012 (1938).

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[\[FN4\]](#) [State ex rel. Pittman v. Ladner](#), 512 So. 2d 1271, 42 Ed. Law Rep. 470 (Miss. 1987) (liability where public official contracts in method not authorized by statute).

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[\[FN5\]](#) [People v. Chacon](#), 40 Cal. 4th 558, 53 Cal. Rptr. 3d 876, 150 P.3d 755 (2007); [State v. Venema](#), 257 Wis. 2d 491, 2002 WI App 202, 650 N.W.2d 898 (Ct. App. 2002).

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[\[FN6\]](#) [In re Ark-La-Tex Antique and Classic Vehicles, Inc.](#), 943 So. 2d 1169 (La. Ct. App. 1st Cir. 2006), writ denied, [948 So. 2d 151](#) (La. 2007).

- As to the acceptance of bribes, gifts gratuities, or unlawful interests by a public official, see [§ 337](#).

- As to the crime of having an interest in a public contract, see [§ 367](#).

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XI. Liability

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**§ 337. Acceptance of bribes, gifts, gratuities, or unlawful interests**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [110](#) to [119](#)

**A.L.R. Library**

[Recovery of money paid, or property transferred, as a bribe, 60 A.L.R.2d 1273](#)

If a public officer takes any gift, gratuity, or benefit in violation of the officer's duty, or acquires any interest adverse to a principal without a full disclosure, it is a betrayal of trust and a breach of confidence, and he or she must account for everything received.<sup>[FN1]</sup> Statutory prohibitions against public officials having a financial interest in contracts made by them in their official capacity, including the acceptance of a bribe to influence a public entity to enter into a particular contract, embody the principle that the duties of public office demand the absolute loyalty and undivided allegiance of the individual who holds the office.<sup>[FN2]</sup> State statutes prohibit public employees from accepting gifts of over a certain value when the intent of the giver to influence the employee could be reasonably inferred, or if the gift could reasonably be expected to influence the employee in the performance of official duties.<sup>[FN3]</sup> However, the mere fact of employment or similar financial interest does not mandate disqualification of a public official in every instance.<sup>[FN4]</sup>

**Practice Tip:** To establish a violation of a gratuity statute, there must be proof of linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action, such as holding a hearing on proposed legislation that, if passed, could benefit the giver of the gratuity.[FN5]

It has been held that a bribe cannot be recovered by the briber from an official to whom it has been paid,[FN6] nor can the assignee of the briber,[FN7] even where the official has made an express promise to repay it.[FN8] Absent a statute directing the return of moneys used in a bribe, public policy forbids return of the money to the briber whether his or her efforts be a success or failure.[FN9]

**Observation:** By federal statute, money received or tendered in evidence in any federal court, or before any officer of the court, which has been paid to, or received by, an official as a bribe, will, after the final disposition, be deposited in the registry of the court to be disposed of in accordance with the order of the court, subject to a second statute specifically addressing withdrawal of moneys paid into any federal court or received by officers in a pending or adjudicated case.[FN10] Under such statutes, the return of money allegedly constituting a bribe has been refused, even when the defendant accused of paying the bribe is acquitted.[FN11]

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[FN1] U.S. v. Carter, 217 U.S. 286, 30 S. Ct. 515, 54 L. Ed. 769 (1910); Breathitt County v. Cockrell, 250 Ky. 743, 63 S.W.2d 920, 92 A.L.R. 626 (1933).

- As to bribery generally, see Am. Jur. 2d, Bribery §§ 1 et seq.

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[FN2] County of San Bernardino v. Walsh, 158 Cal. App. 4th 533, 69 Cal. Rptr. 3d 848 (2d Dist. 2007), as modified on denial of reh'g, (Jan. 25, 2008) and as modified, (Jan. 28, 2008) and review denied, (Apr. 9, 2008).

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[FN3] Rubenfeld v. New York State Ethics Com'n, 43 A.D.3d 1195, 841 N.Y.S.2d 397 (3d Dep't 2007).

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[FN4] Schupak v. Zoning Bd. of Appeals of Town of Marbletown, 31 A.D.3d 1018, 819 N.Y.S.2d 335 (3d Dep't 2006), leave to appeal dismissed, 8 N.Y.3d 842, 830 N.Y.S.2d 694, 862 N.E.2d 786 (2007).

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[FN5] Scaccia v. State Ethics Com'n, 431 Mass. 351, 727 N.E.2d 824 (2000).

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[FN6] Womack v. Maner, 227 Ark. 786, 301 S.W.2d 438, 60 A.L.R.2d 1271 (1957); State v. Pierro, 192 Conn. 98, 470 A.2d 240 (1984); State v. Gunzelman, 200 Kan. 12, 434 P.2d 543 (1967); State v. Strickland, 42 Md. App. 357, 400 A.2d 451 (1979); State v. Konchesky, 166 W. Va. 57, 272 S.E.2d 452 (1980).

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[FN7] Bruder v. State, 601 S.W.2d 102 (Tex. Civ. App. Dallas 1980), writ refused n.r.e., (Oct. 29, 1980).

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[FN8] Malatkofski v. U.S., 179 F.2d 905 (1st Cir. 1950).

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[FN9] State v. Strickland, 42 Md. App. 357, 400 A.2d 451 (1979).

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[\[FN10\] 18 U.S.C.A. § 3666](#) (referring to provisions of [28 U.S.C.A. § 2042](#)).

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[\[FN11\] U.S. v. Pecora, 584 F. Supp. 1 \(E.D. La. 1984\)](#) (under predecessor to [18 U.S.C.A. § 3666](#)); [U.S. v. Kim, 870 F.2d 81 \(2d Cir. 1989\)](#) (taxpayer acquitted of a bribery charge not entitled to return of money allegedly constituting bribe, since jury's verdict in criminal proceeding not binding on court in civil proceeding).

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XI. Liability

A. Civil Liability

1. Liability of Public Officers

e. Liability as to Particular Matters or Conduct

(2) Liability as to Public Funds

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## **§ 338. Basis of liability**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [111](#), [129](#)

### **Forms**

Individuals or entities who control public funds have a duty to account for their handling of those funds. The reason for such duty is to prevent frauds against the public, to protect public funds, and to place final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds.[\[FN1\]](#)

A public officer, in the absence of statutory provisions to the contrary, has been said to be absolutely liable as an insurer for the safekeeping of funds in the officer's custody until disbursed in regular course.[\[FN2\]](#) However, the theory that a public officer in charge of public moneys is a debtor and insurer has been repudiated in some instances, and the public officer has been regarded as a bailee or trustee who is liable only for the failure to use ordinary diligence and care.[\[FN3\]](#) A third and intermediate doctrine is that considerations of public policy enlarge the degree of responsibility of the officer beyond that of a mere bailee for hire; the officer is exonerated only when he or she has observed the highest care, vigilance, and diligence to prevent loss. It has been held that there is no distinction, as regards liability, between public and private funds in the official custody of an officer.[\[FN4\]](#)

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[\[FN1\]](#) [Oriana House, Inc. v. Montgomery](#), 108 Ohio St. 3d 419, 2006-Ohio-1325, 844 N.E.2d 323 (2006).

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[\[FN2\]](#) [Cecil v. Gila County](#), 71 Ariz. 320, 227 P.2d 217 (1951); [Jones v. Hadfield](#), 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936); [People, by Barrett v. Bradford](#), 372 Ill. 63, 22 N.E.2d 691, 155 A.L.R. 427 (1939); [Bordy v. Smith](#), 150 Neb. 272, 34 N.W.2d 331, 5 A.L.R.2d 250 (1948); [Page v. Sawyer](#), 223 N.C. 102, 25 S.E.2d 443 (1943).

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[\[FN3\]](#) [Jordon v. Baker](#), 252 Ky. 40, 66 S.W.2d 84, 93 A.L.R. 813 (1933).

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[\[FN4\]](#) [Hometrust Life Ins. Co. v. U. S. Fidelity & Guaranty Co.](#), 298 F.2d 379 (5th Cir. 1962).

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A. Civil Liability

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(2) Liability as to Public Funds

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**§ 339. Expenditure; loss of funds; misapplication or misappropriation**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [111](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 78](#) (Complaint, petition, or declaration—By state on relation of county attorney—Against county commissioner and sureties—Payment of invalid claim against county)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 79](#) (Complaint, petition, or declaration—Against county officer and sureties—To recover money paid officer on improper expense claims)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 82](#) (Complaint, petition, or declaration—Allegation—Treasurer's fraudulent appropriation of public funds)

Persons charged with handling public funds are held strictly accountable for those funds.<sup>[FN1]</sup> A public official who controls public funds may be held personally liable to repay improperly expended funds if he or she has failed to exercise due care in permitting the expenditure.<sup>[FN2]</sup> Some courts, however, have followed a strict liability rule and hold a public official personally liable whenever he or she has permitted expenditures that the public entity is not authorized to make.<sup>[FN3]</sup> A public officer is thus strictly liable for loss of public funds received by virtue of office, so that a showing of wrongdoing is not required.<sup>[FN4]</sup>

Other courts, taking a different view, hold that public officials who mispend public funds incur no personal liability so long as they act in good faith, believing that they have authority to expend the money for the purposes for which the issue warrants.<sup>[FN5]</sup>



Other states apply a due care standard, holding public officials liable if they spend funds having reasonable cause to suspect that the expenditures might be improper, or if they fail to prevent an improper expenditure because of negligent performance of their official oversight duties.[\[FN6\]](#) As to the determination whether a public official has acted with due care, a court may consider whether:

- the expenditure's impropriety was obvious
- the official was alerted to the possible invalidity of the expenditure
- the official relied upon legal advice or on the presumed validity of an existing legislative enactment or judicial decision in making the expenditure[\[FN7\]](#)

**Practice Tip:** The lack of a willful violation is not a defense to the charge of a negligent violation of a statute that provides that no local fiscal body may expend money for an unauthorized purpose.[\[FN8\]](#)

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[\[FN1\] Smith v. Spokane County, 89 Wash. App. 340, 948 P.2d 1301 \(Div. 3 1997\).](#)

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[\[FN2\] Stevens v. Geduldig, 42 Cal. 3d 24, 227 Cal. Rptr. 405, 719 P.2d 1001 \(1986\).](#)

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[\[FN3\] City of Newport v. McLane, 256 Ky. 803, 77 S.W.2d 27, 96 A.L.R. 655 \(1934\); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265, 146 A.L.R. 750 \(1943\); In re Borough of Rankin, 347 Pa. 40, 31 A.2d 543 \(1943\).](#)

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[\[FN4\] Hartford Ins. Co. v. Hale, 154 A.D.2d 909, 546 N.Y.S.2d 61 \(4th Dep't 1989\).](#)

- While a public officer may be charged with the duty of restitution at the instance of a taxpayer even though he or she received public moneys without fraud, such is not the case for entities or recipients who are not public officials. [Clowes v. Pulver, 258 A.D.2d 50, 691 N.Y.S.2d 649 \(3d Dep't 1999\).](#)

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[\[FN5\] Adams v. Bryant, 236 Ark. 859, 370 S.W.2d 432 \(1963\); LaFleur v. Roberts, 157 So. 2d 340 \(La. Ct. App. 3d Cir. 1963\); McCarty v. City of St. Paul, 279 Minn. 62, 155 N.W.2d 459 \(1967\); Town of Old Fort v. Harmon, 219 N.C. 245, 13 S.E.2d 426 \(1941\); Board of Ed. of Oklahoma City v. Cloudman, 1939 OK 297, 185 Okla. 400, 92 P.2d 837 \(1939\).](#)

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[\[FN6\] Stanson v. Mott, 17 Cal. 3d 206, 130 Cal. Rptr. 697, 551 P.2d 1 \(1976\); City of Lake Worth v. First Nat. Bank in Palm Beach, 93 So. 2d 49 \(Fla. 1957\).](#)

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[\[FN7\] Stanson v. Mott, 17 Cal. 3d 206, 130 Cal. Rptr. 697, 551 P.2d 1 \(1976\).](#)

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[\[FN8\] Lane v. Blair, 162 W. Va. 281, 250 S.E.2d 124 \(1978\).](#)

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XI. Liability

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1. Liability of Public Officers

e. Liability as to Particular Matters or Conduct

(2) Liability as to Public Funds

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**§ 340. Expenditure; loss of funds; misapplication or misappropriation—Loss due to acts of subordinates**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [111](#)

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[Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140](#)

Public officers having the custody of public funds or property are generally held liable for losses due to the negligence or misconduct of their subordinates.<sup>[FN1]</sup> In this regard, a public officer is generally liable for the loss of public moneys in his or her charge as a result of embezzlement by subordinates,<sup>[FN2]</sup> however careful and prudent the officer may have been.<sup>[FN3]</sup>

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[FN1] [Bird v. McGoldrick, 277 N.Y. 492, 14 N.E.2d 805, 116 A.L.R. 1059 \(1938\)](#).

- As to liability of public officers for the conduct of subordinates generally, see [§ 335](#).

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[FN2] [Bird v. McGoldrick, 277 N.Y. 492, 14 N.E.2d 805, 116 A.L.R. 1059 \(1938\)](#); [Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 \(1943\)](#).

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[FN3] [Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 \(1943\)](#).

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**§ 341. Wrongful or unauthorized deposits**

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## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 83](#) (Complaint, petition, or declaration—Allegation—Deposit of public funds in unqualified bank—Violation of depository law)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 84](#) (Complaint, petition, or declaration—Allegation—Wrongful deposit of public funds in bank of which public officer was director—Failure to ascertain financial condition of bank)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 85](#) (Complaint, petition, or declaration—Allegation—Presentation of claim to public officer and sureties)

A public officer will be held liable for resulting loss where—

— the officer permits funds to remain on deposit in a bank that does not meet the requirements of a law requiring the deposit of public funds in depositories qualifying under the law.[\[FN1\]](#)

— the officer fails to account, on the day fixed by law, for funds in the officer's possession on deposit in a then-solvent concern.[\[FN2\]](#)

— the officer negligently deposits or permits funds to remain on deposit after learning, or being charged with knowledge, of the precarious financial condition of the bank in which they are deposited.[\[FN3\]](#)

Deposits by an officer in a bank in which he or she is interested as stockholder, director, officer, or partner have been held to violate statutes that prohibit public officers from becoming interested in any contracts made by them in their official capacity,[\[FN4\]](#) or from receiving any valuable consideration, or from commingling public money with that of their own or of any other person, firm, or corporation.[\[FN5\]](#) The officer would be guilty of actionable negligence for depositing public money in a bank in which he or she is interested, knowing that the bank is insolvent and has given no bond for the security of the money.[\[FN6\]](#)

When depositories for public funds have been designated by law, and public officers are required or authorized to deposit public funds with such designated depositories, the officers, so long as they comply with the requirements of the law, are generally not liable for the loss of the funds deposited.[\[FN7\]](#) However, if the custodian of public funds has knowledge of facts that would influence an ordinarily prudent and cautious person to take further steps to protect the funds, it is the custodian's duty to take such steps, and the failure to act may amount to liability for negligence as bailee for any loss that may occur, even when the custodian employs a statutorily designated depository as custodian.[\[FN8\]](#)

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[\[FN1\] McBride v. People ex rel. City of Trinidad, 111 Colo. 577, 144 P.2d 777 \(1943\); Garfield County v. Pearl, 138 Neb. 810, 295 N.W. 820 \(1941\).](#)

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[\[FN2\] People, by Barrett v. Bradford, 372 Ill. 63, 22 N.E.2d 691, 155 A.L.R. 427 \(1939\).](#)

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[\[FN3\] Jordon v. Baker, 252 Ky. 40, 66 S.W.2d 84, 93 A.L.R. 813 \(1933\).](#)

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[\[FN4\]](#) As to financial interests in contracts, see [§ 336](#).

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[\[FN5\] City of Marshall v. Gregoire, 193 Minn. 188, 259 N.W. 377, 98 A.L.R. 711 \(1935\).](#)

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[\[FN6\] Village of Hampton v. Gausman, 136 Neb. 550, 286 N.W. 757 \(1939\).](#)

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[\[FN7\] Jordon v. Baker, 252 Ky. 40, 66 S.W.2d 84, 93 A.L.R. 813 \(1933\).](#)

- As to particular institutions designated as proper depositories for federal government funds, see [Am. Jur. 2d, Public Funds §§ 30 to 32](#).

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[\[FN8\] Jordon v. Baker, 252 Ky. 40, 66 S.W.2d 84, 93 A.L.R. 813 \(1933\).](#)

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**§ 342. Money unlawfully collected**

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Moneys collected under color of office without authority of law generally must be accounted for and paid to the public agency in whose name and by whose authority they were represented to have been collected.<sup>[FN1]</sup> This is the rule where an officer, under color of office, has exacted fees in excess of those authorized by statute,<sup>[FN2]</sup> and where the officer has collected them under an unconstitutional or ineffective statute authorizing the collection on behalf of the public agency.<sup>[FN3]</sup> However, it has been held that payments voluntarily paid to an officer by an individual under a mutual mistake of law cannot be recovered from the officer on the ground that the officer exacted the payments under an unconstitutional statute.<sup>[FN4]</sup>

**Practice Tip:** A federal statute provides for the Attorney General to bring a civil action to recover an amount due to the federal government on settlement of an account of a person accountable for public money when the person neglects or refuses to pay the amount to the Treasury.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Webster County v. Nance, 362 S.W.2d 723 \(Ky. 1962\).](#)

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<sup>[FN2]</sup> [Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115, 99 A.L.R. 642 \(1935\); Webster County v. Nance, 362 S.W.2d 723 \(Ky. 1962\).](#)

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<sup>[FN3]</sup> [Gillum v. Johnson, 7 Cal. 2d 744, 62 P.2d 1037, 108 A.L.R. 595 \(1936\).](#)

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<sup>[FN4]</sup> [Kleban v. Morris, 363 Mo. 7, 247 S.W.2d 832 \(1952\).](#)

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<sup>[FN5]</sup> [§ 406.](#)

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**§ 343. Interest on funds; profits**

**West's Key Number Digest**

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**A.L.R. Library**

[Liability of public officer for interest or other earnings received on public money in his possession, 5 A.L.R.2d 257](#)

A public officer with custody of public funds must, if he or she has handled the funds so that interest has accrued on them, account for the interest in the same manner as for the principal.<sup>[FN1]</sup> The fact that a public officer violated a criminal statute in putting funds to use for his or her own purposes does not relieve the officer from liability for interest on such funds.<sup>[FN2]</sup> Not only are public officers personally liable for moneys that they have fraudulently misappropriated or lost,<sup>[FN3]</sup> but they may also be held to account for interest from the time when the misappropriated moneys ought to have been paid over.<sup>[FN4]</sup>

If a public officer derives any profits from the use of public funds, he or she must account for, and pay over, such profits to the public agency the officer serves.<sup>[FN5]</sup>

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[\[FN1\] Bordy v. Smith, 150 Neb. 272, 34 N.W.2d 331, 5 A.L.R.2d 250 \(1948\); McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 \(1964\); University of S. C. v. Elliott, 248 S.C. 218, 149 S.E.2d 433 \(1966\); City of Milwaukee v. Drew, 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 \(1936\).](#)

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[\[FN2\] Bordy v. Smith, 150 Neb. 272, 34 N.W.2d 331, 5 A.L.R.2d 250 \(1948\).](#)

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[\[FN3\] § 339.](#)

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[\[FN4\] Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\).](#)

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[\[FN5\] Breathitt County v. Cockrell, 250 Ky. 743, 63 S.W.2d 920, 92 A.L.R. 626 \(1933\); Bordy v. Smith, 150 Neb. 272, 34 N.W.2d 331, 5 A.L.R.2d 250 \(1948\); City of Milwaukee v. Drew, 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 \(1936\).](#)

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a. In General



## § 344. Generally

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West's Key Number Digest, [Officers and Public Employees](#) 123 to 143

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 72](#) (Complaint, petition, or declaration—Against public officer and sureties—General form)

The purpose of official bonds is to provide assurance, through joint and several liability, to the public in the event a public official does not fulfill the duties and obligations required of his or her position.<sup>[FN1]</sup> The principal and sureties on an official bond are all liable for a breach of the bond. Whatever may be the extent of the liability of the officer, personally or otherwise, outside of his or her bond, the officer's liability on the bond is no greater or less than that of the sureties.<sup>[FN2]</sup> Conversely, the liability of the sureties is as great as, but no greater than, that of the officer while acting in an official capacity.<sup>[FN3]</sup>

The liability of both the principal and surety on an officer's bond must be measured by the terms of the instrument,<sup>[FN4]</sup> when construed with reference to the purposes contemplated by the law requiring the bond.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [County of Hudson v. Janiszewski](#), 520 F. Supp. 2d 631 (D.N.J. 2007), as amended, (Nov. 5, 2007) (applying New Jersey law) .

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<sup>[FN2]</sup> [Foster v. Malberg](#), 119 Minn. 168, 137 N.W. 816 (1912).

- As to actions on bonds of court clerks, see [Am. Jur. 2d, Clerks of Court § 37](#).

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<sup>[FN3]</sup> [§ 345](#).

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<sup>[FN4]</sup> [Town of Scotland Neck v. Western Sur. Co.](#), 301 N.C. 331, 271 S.E.2d 501 (1980); [Town of Clayton v. Wall](#), 217 N.C. 365, 8 S.E.2d 223, 127 A.L.R. 854 (1940).

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<sup>[FN5]</sup> [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn.](#), 53 F.2d 178, 81 A.L.R. 1 (C.C.A. 8th Cir. 1931); [Lawrence v. American Sur. Co. of New York](#), 263 Mich. 586, 249 N.W. 3, 88 A.L.R. 535 (1933).

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## § 345. Undertaking of sureties

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Unless a principal on an official bond becomes liable for some default of duties, the surety on such bond cannot be liable.<sup>[FN1]</sup> The engagement of a surety on an official bond rests on the same legal obligation as is by law imposed on the officer.<sup>[FN2]</sup> Thus, whatever is a breach of the conditions of the bond as regards the principal is equally so as to the sureties.<sup>[FN3]</sup> There are, however, certain recognized exceptions, as, for example, where the principal, when sued, takes advantage of a matter of defense that is altogether of a personal character.<sup>[FN4]</sup> The exceptions, however, do not apply where official immunity is extended to an officer as a matter of public policy; if the official is immune, so also is the surety.<sup>[FN5]</sup>

A surety on an officer's bond, like other sureties,<sup>[FN6]</sup> is a person favored by the law, and the surety's obligation cannot be extended by implication or construction.<sup>[FN7]</sup> The surety is entitled to stand on the very terms of the undertaking<sup>[FN8]</sup> and is bound to the extent, in the manner, and under the circumstances, pointed out in the obligation, and no further.<sup>[FN9]</sup>

However, a surety may be held liable for the acts of a person as an officer of an office not mentioned in the bond, where the surety knows that the person is acting as such.[FN10]

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[FN1] [Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 614 S.E.2d 680 \(2005\).](#)

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[FN2] [Avery County v. Braswell, 215 N.C. 270, 1 S.E.2d 864 \(1939\).](#)

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[FN3] [Avery County v. Braswell, 215 N.C. 270, 1 S.E.2d 864 \(1939\); Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 \(1963\).](#)

- As to the extent of the surety's liability, see §§ [356](#), [357](#); for discussion of liability as confined to official acts, see [§ 347](#).

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[FN4] [Am. Jur. 2d, Suretyship §§ 93 to 95.](#)

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[FN5] [Phelps v. Dawson, 97 F.2d 339, 116 A.L.R. 1343 \(C.C.A. 8th Cir. 1938\).](#)

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[FN6] As to the liability of sureties generally, see [Am. Jur. 2d, Suretyship §§ 19 to 28.](#)

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[FN7] [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\); City of Washington v. Trust Co. of Washington, 205 N.C. 382, 171 S.E. 438 \(1933\).](#)

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[FN8] [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[FN9] [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

- As to statutory requirements being read into the terms of the bond, see [§ 131](#).

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[FN10] [Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\)](#), holding that where a bond was issued to an officer who held three offices, but the action against the surety was based on the officer's actions as the official tax search officer, which office was not listed on the bond, the surety was liable, since the officer had held that post prior to the execution of the bond in question, the surety knew of the designation of the officer as the official tax search officer, and the surety received a copy of his annual designation as such officer during each year in which the bond was in effect.

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#### **§ 346. Effect of change in duties of office**

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#### **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 89](#) (Answer—Defense—Of surety—Acts of public officer done in furtherance of duties covered by special bond)

A surety's obligation on an official bond covers new or additional duties imposed on the office so connected with, or naturally belonging to, it as to be within the reasonable contemplation of the parties to the bond.<sup>[FN1]</sup> In this regard, statutory provisions sometimes specifically continue the liability of the sureties on official bonds notwithstanding the imposition upon their principal of additional duties.<sup>[FN2]</sup> Furthermore, under some state laws, a surety company may be held liable under a general bond for a duty imposed upon an officer subsequent to the issuance of the bond where a new duty is imposed by court rule or order rather than by the legislature.<sup>[FN3]</sup>

However, where a statute imposes new duties on a public officer or charges the officer with the performance of duties that do not properly fall within the functions of the office, it may require the officer to give a special or additional bond for the faithful performance of the new or special duties. Sureties on the general bond are usually not liable for any failure of the officer with respect to duties under the special bond, in the absence of an express declaration that

they are to be so liable.[FN4] On the other hand, a contrary conclusion has been reached, where the additional bond was for a minimal amount and the additional duties were similar to the other duties of the officer.[FN5]

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[FN1] Holland v. American Sur. Co. of New York, 149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451 (1942); Peters v. Bechdolt, 100 Ind. App. 395, 192 N.E. 116 (1934); Fidelity & Deposit Co. of Maryland v. Board of Trustees of Elkton Graded Common School Dist., 247 Ky. 535, 57 S.W.2d 457 (1933); City of Rice Lake v. Jensen, 216 Wis. 1, 255 N.W. 130, 94 A.L.R. 609 (1934).

[FN2] State ex rel. Hardesty v. Stalnaker, 167 W. Va. 854, 280 S.E.2d 697 (1981).

[FN3] Matter of Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App. 1988).

[FN4] Road Dist. No. 1 of Jackson Parish v. Fidelity & Deposit Co. of Maryland, 195 La. 621, 197 So. 252 (1940).

[FN5] Holland v. American Sur. Co. of New York, 149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451 (1942).

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**§ 347. Requirement that breach relate to official act**

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West's Key Number Digest, [Officers and Public Employees](#) [123](#), [124](#), [129](#), [131](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 89](#) (Answer—Defense—Of surety—Acts of defendant public officer not performed in official capacity)

In order for the surety to be held liable under a public official's bond, the official's act or omission must be within the scope or duties of the office.<sup>[FN1]</sup> Where an official bond does not define the duties of the office, an act will be a breach of the bond if without a bond it would have amounted to breach of an official duty.<sup>[FN2]</sup> Generally, where the law defines the duties of a public officer, the officer's sureties are responsible for the faithful performance of such duties and are liable for wrongful acts in the discharge of such duties,<sup>[FN3]</sup> or for the failure properly to perform the duties imposed on the officer,<sup>[FN4]</sup> but are not liable for acts that do not pertain to official duties.<sup>[FN5]</sup>

A distinction has sometimes been drawn between acts done by virtue of office and acts done under color of office. In this regard, if the act is done by virtue of office, the sureties are liable, while if the act is done under color of office, but not by virtue of office, the sureties are not liable.<sup>[FN6]</sup> Acts done "by virtue of office," under this view, are those within the authority of the officer, but in the doing of which the officer exercises such authority improperly or abuses the confidence that the law reposes in him or her; acts done "under color of office" are ones that the office gives the officer no authority to perform.<sup>[FN7]</sup>

This distinction has been rejected by other courts, however.<sup>[FN8]</sup> The sureties on a bond of an officer, conditioned upon the faithful performance of the officer's duties, has been held liable to all persons unlawfully injured by the nonfeasance, misfeasance, or malfeasance perpetrated by such officer, either by virtue of office or under color of office.<sup>[FN9]</sup> If the officer acts without any actual or apparent authority whatever, the sureties are not liable.<sup>[FN10]</sup>

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<sup>[FN1]</sup> [USF&G Co. v. Conservatorship of Melson](#), 809 So. 2d 647 (Miss. 2002).

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<sup>[FN2]</sup> [Thurston County, to Use of Vesely v. Chmelka](#), 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 (1940).

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<sup>[FN3]</sup> [Weidler v. Arizona Power Co.](#), 39 Ariz. 390, 7 P.2d 241 (1932); [Bencie v. Williams](#), 337 Ill. App. 414, 86 N.E.2d 258 (4th Dist. 1949).

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[\[FN4\] Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 \(1928\)](#) (liability of sureties on jailer's bond); [Ingles v. Hotze, 1942 OK 325, 191 Okla. 378, 130 P.2d 302 \(1942\)](#).

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[\[FN5\] Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 \(1928\)](#); [Eckstein v. Massachusetts Bonding & Insurance Co., 281 N.Y. 435, 24 N.E.2d 114, 125 A.L.R. 1143 \(1939\)](#); [Town of Clayton v. Wall, 217 N.C. 365, 8 S.E.2d 223, 127 A.L.R. 854 \(1940\)](#).

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[\[FN6\] Weidler v. Arizona Power Co., 39 Ariz. 390, 7 P.2d 241 \(1932\)](#).

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[\[FN7\] Weidler v. Arizona Power Co., 39 Ariz. 390, 7 P.2d 241 \(1932\)](#).

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[\[FN8\] Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 \(1929\)](#).

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[\[FN9\] Hopkins v. INA Underwriters Ins. Co., 44 Ohio App. 3d 186, 542 N.E.2d 679 \(4th Dist. Pickaway County 1988\)](#).

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[\[FN10\] Curtis v. American Sur. Co. of N.Y., 188 Misc. 107, 66 N.Y.S.2d 167 \(Sup 1946\)](#), order aff'd, [272 A.D. 1078, 74 N.Y.S.2d 903 \(3d Dep't 1947\)](#); [Town of Clayton v. Wall, 217 N.C. 365, 8 S.E.2d 223, 127 A.L.R. 854 \(1940\)](#).

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**§ 348. Effect of nature of act as judicial, discretionary, or ministerial**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [123](#), [124](#), [129](#), [131](#)

The liability of an officer on a bond is ordinarily confined to acts of misfeasance or nonfeasance in the performance of ministerial duties.<sup>[FN1]</sup> If an officer would not be liable for a judicial<sup>[FN2]</sup> or discretionary act,<sup>[FN3]</sup> there is generally no liability on the officer's bond.<sup>[FN4]</sup> However, a failure to perform, or negligence in performing, duties positively enjoined by law on officers and boards, may render them liable on their bonds even though their duties are primarily discretionary.<sup>[FN5]</sup>

Where an official bond, as construed with the statute under which it was given, protects against misfeasances of an officer while performing judicial functions, the sureties may be liable if the officer maliciously deprives a person of property or rights.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Eckstein v. Massachusetts Bonding & Insurance Co.](#), 281 N.Y. 435, 24 N.E.2d 114, 125 A.L.R. 1143 (1939).

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<sup>[FN2]</sup> As to civil liability of judges generally, see [Am. Jur. 2d, Judges §§ 61 to 79](#).

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<sup>[FN3]</sup> As to the effect on public officers' or employees' liability of the nature of the act as discretionary or ministerial, see §§ [318](#), [321](#).

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<sup>[FN4]</sup> [Deatsch v. Fairfield](#), 27 Ariz. 387, 233 P. 887, 38 A.L.R. 651 (1925); [Dunbar v. Fant](#), 170 S.C. 414, 170 S.E. 460, 90 A.L.R. 1412 (1933).

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<sup>[FN5]</sup> [Bankhead v. Howe](#), 56 Ariz. 257, 107 P.2d 198, 131 A.L.R. 269 (1940); [Fidelity & Deposit Co. of Maryland v. Cone](#), 138 Fla. 804, 190 So. 268, 123 A.L.R. 750 (1939).

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<sup>[FN6]</sup> [Eckstein v. Massachusetts Bonding & Insurance Co.](#), 281 N.Y. 435, 24 N.E.2d 114, 125 A.L.R. 1143 (1939).

- As to the effect of malice on liability for a public officer's or employee's conduct generally, see [§ 327](#).

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## **§ 349. Conduct regarding public funds**

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### **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 74](#) (Complaint, petition, or declaration—Against county treasurer and sureties—Failure to turn funds over to successor)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 77](#) (Complaint, petition, or declaration—Against township tax collector and sureties—Failure to turn over to township moneys collected)

The customary obligation of a public officer's bond is for the receipt, safekeeping, and disbursement of public funds according to law, and for the faithful discharge of the duties of the officer as custodian of the funds.<sup>[FN1]</sup> It has been held that liability on the bond extends to all money received by virtue of, or under color of, office,<sup>[FN2]</sup> even though the

money is collected by the officer in bad faith.[FN3] As a matter of public policy, the officer and surety are estopped from asserting that the public body has no right to the money because the officer has not been authorized to collect it.[FN4]

The sureties on an officer's bond are liable to the extent of the amount diverted, up to the limit of their bonds, for the diversion of public funds which, by law, may be expended only for a particular purpose.[FN5] If the officer receives money in his or her official capacity and converts it to his or her own use, the officer is guilty of official misconduct, for which the sureties on the official bond are liable.[FN6] Drawing money from the public treasury on a warrant based on an illegal and unauthorized allowance by a board of officials is a breach of the officer's bond, and renders the sureties liable for the amount so drawn.[FN7] Where an officer is by statute required to pay over money to a certain official at a certain time, or to turn over the property to a successor, such payment and delivery at the time specified is an active duty which, if the officers fails to perform, is a breach of the bond.[FN8]

Under a statute governing the liabilities and rights of action on official bonds, a plaintiff may be allowed to maintain a suit against a public officer and the surety on the official bond for acts of negligence in performing the officer's official duties.[FN9]

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[FN1] Thurston County, to Use of Vesely v. Chmelka, 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 (1940).

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[FN2] Thurston County, to Use of Vesely v. Chmelka, 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 (1940).

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[FN3] Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115, 99 A.L.R. 642 (1935).

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[FN4] Yuma County v. Wisener, 45 Ariz. 475, 46 P.2d 115, 99 A.L.R. 642 (1935).

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[FN5] City of Newport v. McLane, 256 Ky. 803, 77 S.W.2d 27, 96 A.L.R. 655 (1934).

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[FN6] State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 (1977); Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 (1980).

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[FN7] Joint Consol. School Dist. No. 2 v. Johnson, 163 Kan. 202, 181 P.2d 504 (1947).

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[FN8] American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 (C.C.A. 8th Cir. 1931).

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[FN9] Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 195 Ed. Law Rep. 664 (2005).

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## **§ 350. Conduct regarding public funds—Receipt and retention of unauthorized salaries**

### **West's Key Number Digest**

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Under a bond providing indemnification for loss caused through the failure of a public officer to faithfully perform his or her duties or to account properly for all moneys and property received by virtue of the officer's position or employment, the action of the public officer in seeking and receiving an unauthorized salary increase[[FN1](#)] or in refusing to return overpayments of salary[[FN2](#)] constitutes a breach of the bond and renders the surety liable. Failure to disgorge the sums the officer received as unauthorized salary constitutes a failure to properly account for moneys received by virtue of the officer's position or employment.[[FN3](#)]

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[[FN1](#)] [Busbee v. Reserve Ins. Co.](#), 243 Ga. 371, 254 S.E.2d 324 (1979).

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[[FN2](#)] [Maryland Cas. Co. v. Kansas City, Mo.](#), 128 F.2d 998 (C.C.A. 8th Cir. 1942); [State ex rel. Hardesty v. Stalnaker](#), 167 W. Va. 854, 280 S.E.2d 697 (1981).

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[\[FN3\] Maryland Cas. Co. v. Kansas City, Mo., 128 F.2d 998 \(C.C.A. 8th Cir. 1942\); Busbee v. Reserve Ins. Co., 243 Ga. 371, 254 S.E.2d 324 \(1979\); State ex rel. Hardesty v. Stalnaker, 167 W. Va. 854, 280 S.E.2d 697 \(1981\).](#)

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## **§ 351. Losses due to theft or embezzlement by others**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [123](#), [124](#), [129](#), [131](#)

In some jurisdictions, that public funds have been stolen without the fault or negligence of the public official is not recognized as an excuse for the failure to comply with the terms of the officer's bond to keep public moneys safe. The reason for this rule, as to absolute liability on the bond, has been found in considerations of public policy that render a custodian of public money an insurer against all losses occurring otherwise than by the act of god or the public enemy.[\[FN1\]](#) However, the view has also been followed that, unless it is shown that there was a lack of due care, a public official will not be liable on an official bond for loss of public funds resulting from embezzlement by a subordinate employee.[\[FN2\]](#)

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[FN1] [Cecil v. Gila County, 71 Ariz. 320, 227 P.2d 217 \(1951\)](#).

- As to the liability of a public officer as an insurer, see [§ 338](#).
- As to liability of public officers generally for losses as the result of conduct of subordinates, see [§ 340](#).

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[FN2] [Placer County v. Aetna Cas. & Sur. Co., 50 Cal. 2d 182, 323 P.2d 753 \(1958\)](#).

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## § 352. Generally

### West's Key Number Digest

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The period of time during which a surety is liable for defaults of the principal is dependent primarily on the terms of the bond as construed with the law under which the bond is given.[FN1] Generally, where the office of the principal is

for a definite term, the surety will be held liable only for a default of the principal during the term for which the bond is given.<sup>[FN2]</sup> Even so, in some jurisdictions, the parties may contract beyond one term of office; in this regard, a bond, the expiration of which was specified as being "indefinite," has been construed as to involve a single, continuous bond, valid for successive terms of a public official.<sup>[FN3]</sup>

If two offices cannot be held by the same person, an officer, by accepting and qualifying for an incompatible office, terminates the liability of the sureties on the bond for future acts with respect to the first office.<sup>[FN4]</sup>

When an officer gives two or more successive bonds, liability falls only upon the sureties on the bond or bonds in force when the default occurs.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 \(C.C.A. 8th Cir. 1931\).](#)

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<sup>[FN2]</sup> [Aetna Cas. & Sur. Co. v. State for Use and Benefit of City of Dallas, 86 S.W.2d 826 \(Tex. Civ. App. Fort Worth 1935\), writ dismissed; American Surety Co. of New York v. Commonwealth, 180 Va. 97, 21 S.E.2d 748 \(1942\).](#)

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<sup>[FN3]</sup> [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

- As to the effect of "continuing" or "cumulative" bonds on the extent of liability, see [§ 357](#).

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<sup>[FN4]</sup> [Pruitt v. Glen Rose Independent School Dist. No. 1, 126 Tex. 45, 84 S.W.2d 1004, 100 A.L.R. 1158 \(Comm'n App. 1935\).](#)

- As to the effect on a public officer's or employee's eligibility for public office or employment, of that person's holding public office, and incompatible offices, see §§ [57](#) to [67](#).

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<sup>[FN5]</sup> [Employers Liability Assur. Corp., Ltd. v. Lewis, 101 Ga. App. 802, 115 S.E.2d 387 \(1960\).](#)

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**§ 353. Defaults prior to execution of bond or in prior term of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [123](#), [124](#), [129](#), [131](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 87](#) (Answer—Defense—Of surety—Codefendant treasurer's conversion of public funds before execution of bond)

Retroactive liability of sureties on official bonds for conduct of public officers or employees occurring within a specified time before the bond was executed has sometimes been imposed by statute.<sup>[FN1]</sup> In this regard, the sureties on the bond for a second term of one's office may be responsible for their principal's failure to properly perform duties of collecting moneys due the public agency at the end of the prior term.<sup>[FN2]</sup> Thus, where an officer succeeds himself or herself in office and it is the officer's duty as an insurer of funds in his or her possession to demand cash in satisfaction of the balance due from himself or herself as predecessor, the surety on the second bond may be liable for losses that occur through the officer's failure in this respect.<sup>[FN3]</sup>

Furthermore, it has been held that the sureties on the bond of an officer's second term are liable for money collected during the second term that is used by the officer to cover a previous defalcation, it being reasoned that the payment of money to cover a defalcation in a prior term constitutes a conversion of money received during the second term, which is as much a breach of the second bond as if the officer had retained the money.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Com. v. Slack, 291 S.W.2d 553 \(Ky. 1956\).](#)

[\[FN2\] Thurston County, to Use of Vesely v. Chmelka, 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 \(1940\); Aetna Casualty & Surety Co. of Hartford, Conn., v. Board of Sup'rs of Warren County, 160 Va. 11, 168 S.E. 617 \(1933\).](#)

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[\[FN3\] Thurston County, to Use of Vesely v. Chmelka, 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 \(1940\).](#)

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[\[FN4\] Strafford v. American Employers' Ins. Co., 89 N.H. 297, 197 A. 819 \(1938\).](#)

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## **§ 354. Defaults after termination of office**

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As a general rule, in the absence of special circumstances or provisions, the sureties on the bond of a public officer are not liable for acts or defaults occurring after the resignation or removal of a public officer,[\[FN1\]](#) even where the



bond contains no recital as to the length of the term.[FN2] However, in some instances, bonds are construed as covering all obligations and duties that had their origin during the term of office, even though the duties are performed after the termination of office.[FN3] Also, the view has been followed that a surety remains liable for any subsequent misappropriation of property or funds that were in the hands of the officer at the time of removal.[FN4] Furthermore, it has been said that the duty of a public officer to turn over to other officers money collected continues after leaving office, and if the officer fails to pay it over when received, the surety is liable though the default occurred after the termination of the office.[FN5]

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[FN1] [Aetna Casualty & Surety Co. of Hartford, Conn., v. Board of Sup'rs of Warren County, 160 Va. 11, 168 S.E. 617 \(1933\).](#)

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[FN2] [Jaeger Mfg. Co. v. Massachusetts Bonding & Ins. Co., 229 Iowa 158, 294 N.W. 268 \(1940\).](#)

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[FN3] [State, for Use of Obion County v. Cobb, 184 Tenn. 675, 202 S.W.2d 819 \(1947\).](#)

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[FN4] [Aetna Casualty & Surety Co. of Hartford, Conn., v. Board of Sup'rs of Warren County, 160 Va. 11, 168 S.E. 617 \(1933\).](#)

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[FN5] [State, for Use of Obion County v. Cobb, 184 Tenn. 675, 202 S.W.2d 819 \(1947\).](#)

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**§ 355. Defaults after termination of office—Effect of holding over; reelection**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [123](#), [124](#), [129](#), [131](#)

Where a public officer is entitled, by statute or otherwise, to hold over in the office until a successor has been elected and qualified, the sureties generally continue to be liable on the bond until the election and qualification of a successor.<sup>[FN1]</sup> The rule applies where the officer is reelected as his or her own successor but fails to qualify for the second term.<sup>[FN2]</sup> The theory sometimes relied on in support of the rule is that the period following the expiration of the term is not a separate and distinct period unrelated to the term for which the sureties had agreed to become bound but is really a part of the original term;<sup>[FN3]</sup> the sureties must be presumed to have executed the bond with the law in mind and to have assumed a liability equal to the possible duration of the officer's tenure in the office.<sup>[FN4]</sup> Even so, in such circumstances, the courts will not hold the sureties liable for an indefinite time; liability is limited to a reasonable time after the expiration of the term.<sup>[FN5]</sup> If it is provided by statute that the office will become vacant if the successor fails to qualify within a specified time, the statutory provision becomes a part of the surety's contract, and the surety is not liable for delinquencies after the date that the office becomes vacant.<sup>[FN6]</sup>

Where a state constitution limits the term during which an office can be held, so that the legislature may not extend the right to hold office beyond that time by providing that the officer will hold office until a successor is appointed, a public officer's bond imposes no liability on the sureties beyond the constitutional term.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn.](#), 53 F.2d 178, 81 A.L.R. 1 (C.C.A. 8th Cir. 1931); [Hartford Acc. & Indem. Co. v. City of Tulare](#), 30 Cal. 2d 832, 186 P.2d 121 (1947); [Garner v. State ex rel. Askins](#), 37 Tenn. App. 510, 266 S.W.2d 358 (1953).

- As to the right of a public officer to hold over until his or her successor is qualified, see §§ [147](#) to [150](#).

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<sup>[FN2]</sup> [Steusoff v. Liberty County](#), 34 S.W.2d 643 (Tex. Civ. App. Beaumont 1930), writ refused, (Mar. 18, 1931).

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<sup>[FN3]</sup> [Garner v. State ex rel. Askins](#), 37 Tenn. App. 510, 266 S.W.2d 358 (1953).

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<sup>[FN4]</sup> [State ex rel. Nagle v. Stafford](#), 97 Mont. 275, 34 P.2d 372 (1934); [Garner v. State ex rel. Askins](#), 37 Tenn. App. 510, 266 S.W.2d 358 (1953).

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[\[FN5\] American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 \(C.C.A. 8th Cir. 1931\).](#)

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[\[FN6\] American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 \(C.C.A. 8th Cir. 1931\).](#)

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[\[FN7\] Miller v. Rockcastle County, 248 Ky. 290, 58 S.W.2d 598 \(1933\).](#)

- As to the effect of constitutional or statutory provisions on the right of a public officer to hold over, see [§ 149](#).

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## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 86](#) (Answer—Defense—Of surety—Penal amount of bond paid to satisfy judgments in other actions)

The liability of sureties on an official bond is limited by the penalty of the bond,[\[FN1\]](#) although a surety may be liable beyond the penal sum for interest with respect to its own default, and ordinarily such further liability would arise only upon demand upon the surety to pay.[\[FN2\]](#) If the amount of the bond is less than the minimum required by statute, the surety will be liable up to the statutory amount, since the bond will be read as though it is for the minimum amount required by statute.[\[FN3\]](#) However, absent statutory restrictions, if a surety assumes a liability in a greater sum than required by statute, it may be held to its undertaking.[\[FN4\]](#) Where the applicable statute does not fix the amount of the bond, but provides that the officer approving the bond must set the amount, the amount set by the surety with the acquiescence of the approving official marks the limits of the surety's liability.[\[FN5\]](#)

The liability of a surety on an official bond cannot exceed that of the principal.[\[FN6\]](#) Where several persons have causes of action on an official bond, they may not together recover more than the penalty of the bond, although the aggregate of the judgments may exceed the penalty.[\[FN7\]](#)

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[\[FN1\]](#) [U.S. v. Maryland Cas. Co., 129 F. Supp. 45 \(D. Md. 1955\)](#); [Worden v. Hunt, 147 So. 2d 548 \(Fla. Dist. Ct. App. 2d Dist. 1962\)](#); [Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\)](#); [Brown v. National Sur. Corp. of N.Y., 207 S.C. 462, 36 S.E.2d 588 \(1946\)](#).

- As to damages recoverable in actions on official bonds, see [§ 495](#).

- As to the amount recoverable in actions on penal bonds, see [Am. Jur. 2d, Bonds §§ 37, 38](#).

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[\[FN2\]](#) [County of Hudson v. Janiszewski, 520 F. Supp. 2d 631 \(D.N.J. 2007\)](#), as amended, (Nov. 5, 2007) (applying New Jersey law).

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[\[FN3\]](#) [State v. Moody, 198 So. 2d 586 \(Miss. 1967\)](#); [Grimes v. Bosque County, 240 S.W.2d 511 \(Tex. Civ. App. Waco 1951\)](#), writ refused n.r.e.

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[\[FN4\]](#) [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 \(1963\)](#).

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[\[FN5\]](#) [City of Middlesboro v. American Sur. Co. of N.Y., 307 Ky. 769, 211 S.W.2d 670 \(1947\)](#); [National Sur. Co. v. Com. ex rel. Coleman, 253 Ky. 607, 69 S.W.2d 1007 \(1934\)](#).

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[\[FN6\]](#) [County of Hudson v. Janiszewski, 520 F. Supp. 2d 631 \(D.N.J. 2007\)](#), as amended, (Nov. 5, 2007) (applying New Jersey law); [Meinecke v. McFarland, 122 Mont. 515, 206 P.2d 1012 \(1949\)](#); [Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\)](#); [State ex rel. Mayle v. Aetna Cas. & Sur. Co., 152 W. Va. 683, 166 S.E.2d 133 \(1969\)](#).

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[\[FN7\] Maryland Cas. Co. v. Alford, 111 F.2d 388 \(C.C.A. 10th Cir. 1940\); Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Brown v. National Sur.Corp. of N.Y., 207 S.C. 462, 36 S.E.2d 588 \(1946\).](#)

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## **§ 357. Effect of "continuing" or "cumulative" nature of bonds**

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West's Key Number Digest, [Officers and Public Employees](#) [131](#)

The extent of liability of a surety on an official bond that is renewed from year to year by the periodic payment of premiums may vary, depending on whether the bond is continuous or cumulative in nature.[\[FN1\]](#)

**Definitions:** A "continuous bond" is regarded as a single, continuous contract under which the liability of the surety is limited to a specified amount stated in the bond, which cannot be exceeded, even if defaults by the principal occur at various times and exceed the stated liability figure in the bond.[\[FN2\]](#) A "cumulative bond" regards the payment and acceptance of periodic premium payments as separate and distinct contracts upon each of which the surety is liable for

defaults by the principal occurring during the term, and each is enforced to the maximum amount stated in the bond.[FN3]

Whether a bond is continuous or cumulative generally depends upon the intent of the parties[FN4] and the circumstances of the case, including the terms of the bond in question.[FN5]

**Practice Tip:** A bond should be examined and construed to determine what the public body purchased with each premium.[FN6]

Liability may be regarded as cumulative where the officer in fact furnishes a new and separate bond each year.[FN7] This may occur in instances in which the officer is elected annually.[FN8] However, when a bond is issued for a definite term and is periodically renewed by certificates that refer to, and adopt the terms of, the original instrument, particularly when the renewal notices clearly provide that the premium is accepted for the renewal of the original bond and that the surety's liability is not to be cumulative, the bond will be regarded as a continuing one, and the surety's total liability will be limited to the amount stated in the original bond.[FN9] The fact that a bond is written for an indefinite period[FN10] and can be terminated only by giving written notice to the obligee[FN11] implies that the bond is continuous in nature, and the fact that the bond covers a period prior to the time the bond was entered into is a factor indicating a continuous contract which ignores successive terms of office.[FN12]

Some courts appear to presume that the renewal of a bond constitutes a separate and distinct contract for the period covered by the renewal, and thus is cumulative in nature, unless it appears to be the intention of the parties, as evidenced by the provisions of the bond, that the bond and its renewal constitute one continuous contract.[FN13] However, it has also been held, in an action in which no evidence was introduced as to the existence of a renewal instrument, rider, or amendment to the bond or of any communication, contact, or correspondence of any kind between the parties, that the lack of evidence to the contrary and the subsequent treatment of the bond indicated that it was regarded by the parties as a single, continuous contract.[FN14]

When coverage has been issued under successive bonds or bonds with different sureties, the coverage is cumulative and not continuous; the first bond is liable to the extent of its penalty amount and the subsequent bond or bonds provide security to the extent of its penalties, for defaults by the principal above the penalty amount of the first bond.[FN15]

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[FN1] [Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\).](#)

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[FN2] [Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[FN3] [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[FN4] [Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[FN5] [City of Middlesboro v. American Sur. Co. of N.Y., 307 Ky. 769, 211 S.W.2d 670 \(1947\); Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Town of Scotland Neck v. Western](#)

[Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN6\] Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN7\] City of Middlesboro v. American Sur. Co. of N.Y., 307 Ky. 769, 211 S.W.2d 670 \(1947\); Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\).](#)

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[\[FN8\] City of Middlesboro v. American Sur. Co. of N.Y., 307 Ky. 769, 211 S.W.2d 670 \(1947\).](#)

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[\[FN9\] Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Town of Troy v. American Fidelity Co., 120 Vt. 410, 143 A.2d 469 \(1958\).](#)

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[\[FN10\] Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN11\] Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN12\] Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN13\] Massachusetts Bonding & Ins. Co. v. Board of Com'rs of Adams County, 100 Colo. 398, 68 P.2d 555 \(1937\).](#)

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[\[FN14\] Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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[\[FN15\] Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 \(1980\).](#)

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XI. Liability

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2. Liability on Official Bond

e. Defenses; Release of Surety

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**§ 358. Defenses, generally**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [127](#), [128](#)

With respect to the liability of sureties on an official bond for a public officer's breach of a public duty, if the public officer has no defense, then no defense is open to the surety.<sup>[FN1]</sup> The public official's immunity is immaterial with respect to a claim on a bond.<sup>[FN2]</sup> The sureties cannot escape liability for the default of their principal on the ground that the default is due to the act, delinquency, or omission of another officer.<sup>[FN3]</sup> Nor does negligence or carelessness by examining officers in the examination of the accounts of the officer discharge the sureties.<sup>[FN4]</sup> Furthermore, a surety is not discharged from liability for an officer's defalcation merely because the officer failed to submit books and records to another official for inspection in compliance with the requirements of a statute, where such statute is designed for the protection of the public and constitutes no part of the contract with the surety.<sup>[FN5]</sup>

A surety is not relieved of liability by the failure of the public body to inform it of prior defalcations, since the doctrine of equitable estoppel cannot be applied to governmental entities.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co.](#), 412 Pa. 222, 194 A.2d 423 (1963).

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<sup>[FN2]</sup> [Smith v. Jackson County Bd. of Educ.](#), 168 N.C. App. 452, 608 S.E.2d 399, 195 Ed. Law Rep. 664 (2005).

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<sup>[FN3]</sup> [Maryland Cas. Co. v. Magoffin County Bd. of Ed.](#), 358 S.W.2d 353 (Ky. 1961); [Strafford v. American Employers' Ins. Co.](#), 89 N.H. 297, 197 A. 819 (1938).

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<sup>[FN4]</sup> [Strafford v. American Employers' Ins. Co.](#), 89 N.H. 297, 197 A. 819 (1938).

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[\[FN5\] \*Strafford v. American Employers' Ins. Co.\*, 89 N.H. 297, 197 A. 819 \(1938\).](#)

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[\[FN6\] \*Maryland Cas. Co. v. Magoffin County Bd. of Ed.\*, 358 S.W.2d 353 \(Ky. 1961\).](#)

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**§ 359. Principal's failure to sign bond**

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[Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 U.S.C.A. sec. 1983, 49 A.L.R.5th 717](#)

Sureties executing an official bond that is not signed by their principal may, by their conduct, be estopped to deny their liability on the bond.[\[FN1\]](#) However, there is also authority to the effect that an official bond may not bind a surety where it is unsigned.[\[FN2\]](#)

**Observation:** Where a principal has failed to sign an official bond, so that the surety on such bond is not bound, liability may, nonetheless be established on a theory of involuntary suretyship. An "involuntary suretyship" may arise without any contract being expressed in positive terms of suretyship, or any actual intent to form that relationship. The suretyship is the result of a contract whose chief object is to accomplish some purpose other than surety, but which has that effect because of the position that the parties have assumed toward each other or toward the property out of which the debt or obligation due to the obligee is paid.[\[FN3\]](#)

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[\[FN1\] Whitlock v. Wood, 193 Ark. 695, 101 S.W.2d 950, 110 A.L.R. 955 \(1937\).](#)

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[\[FN2\] State v. Neiswinger, 524 N.E.2d 21 \(Ind. Ct. App. 1988\).](#)

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[\[FN3\] State v. Neiswinger, 524 N.E.2d 21 \(Ind. Ct. App. 1988\)](#) (finding no involuntary suretyship in this instance).

- As to suretyship by operation of law generally, see [Am. Jur. 2d, Suretyship § 8.](#)

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**§ 360. Contributory or comparative negligence**

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West's Key Number Digest, [Officers and Public Employees](#) [127](#), [128](#)

The courts have not been in agreement on the question of the applicability of contributory and comparative negligence principles in actions on official bonds. On the one hand, there is authority holding that, in an action based on the officer's negligent performance of a duty imposed by law, the officer and surety may raise the comparative or contributory negligence of the plaintiff, so as to reduce or defeat the recovery of damages against them.<sup>[FN1]</sup> However, there is also authority reaching an opposite conclusion.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [United Car & Truck Leasing, Inc. v. Roberts, 150 Ga. App. 369, 257 S.E.2d 905 \(1979\).](#)

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<sup>[FN2]</sup> [State v. United Pac. Ins. Co., 26 Wash. App. 68, 612 P.2d 809 \(Div. 2 1980\).](#)

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**§ 361. Release of surety**

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A statute releasing sureties from liability does not impair the obligation of contract contained in the official bond.[\[FN1\]](#) This rule is founded upon the plenary and virtually unlimited power that the legislature has over agencies of the state, such as counties, townships, and school districts.[\[FN2\]](#)

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[\[FN1\]](#) [Schenebeck v. McCrary, 298 U.S. 36, 56 S. Ct. 672, 80 L. Ed. 1031 \(1936\); Bolivar Tp. Board of Finance of Benton County v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271 \(1934\).](#)

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[\[FN2\]](#) [Bolivar Tp. Board of Finance of Benton County v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271 \(1934\).](#)

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**Primary Authority**

[5 U.S.C.A. §§ 8101](#) to [8193](#)

[18 U.S.C.A. §§ 203, 205, 207](#) to [209, 432, 651, 1902, 1903, 1905](#) to [1907, 1909, 1912, 1913, 1922, 2071](#) to [2073, 2075](#)

[31 U.S.C.A. § 714](#)

[5 C.F.R. §§ 730.101 et seq.](#)

[Fed. R. Crim. P. 12](#)(b)

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## § 362. Generally

### West's Key Number Digest

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No public official is above the law; all may be punished for criminal acts.<sup>[FN1]</sup> Even so, statutes making certain acts crimes sometimes exempt public officers. Thus, for example, laws against carrying weapons are ordinarily not applicable to officers who carry weapons in the actual discharge of their official duties.<sup>[FN2]</sup>

Aside from furnishing grounds for disqualification for holding office and for suspension from or forfeiture of office,<sup>[FN3]</sup> certain conduct of public officers or employees may render a public officer or employee criminally liable, including:

—official malfeasance, misconduct, and corruption,<sup>[FN4]</sup>

— official oppression,<sup>[FN5]</sup>

— certain conduct in violation of election laws or by public officers or employees with regard to political contributions or expenditures,<sup>[FN6]</sup>

— willful omission or neglect to perform duties enjoined by law,<sup>[FN7]</sup>

— embezzlement,<sup>[FN8]</sup>

— extortion,<sup>[FN9]</sup>

— soliciting or receiving a bribe,[\[FN10\]](#) or

— larceny of property in an officer's possession or custody.[\[FN11\]](#) Certain statutes also specifically make criminal the offense of "theft in office."[\[FN12\]](#) Where acts in excess of authority are proscribed under the offense of misconduct in public office, there must be fair notice that conduct contemplated is illegal or improper.[\[FN13\]](#) A statute prohibiting the exercise of discretionary power in an improper manner is not unconstitutionally vague if the term "discretionary power" is defined in the statute, and the statute clearly gives notice of the applicability of the statute and the nature of the penalties.[\[FN14\]](#)

A mere state employee may not be prosecuted for a crime applicable only to state executive and ministerial officers, and to members of the state legislature.[\[FN15\]](#)

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[\[FN1\]](#) *In re Investigation by Dauphin County Grand Jury, June, 1938*, 332 Pa. 289, 2 A.2d 783, 120 A.L.R. 414 (1938).

- As to criminal prosecution of public officials, and procedure in applicable criminal proceedings, see [§ 400](#).

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[\[FN2\]](#) *Am. Jur. 2d, Weapons and Firearms § 21*.

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[\[FN3\]](#) §§ [181](#) to [199](#).

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[\[FN4\]](#) *State v. Kilmer*, 194 Neb. 434, 231 N.W.2d 708 (1975); *Com. v. Steinberg*, 240 Pa. Super. 139, 362 A.2d 379 (1976).

- As to malfeasance in office, see [§ 365](#).

- As to misconduct in office, see [§ 363](#).

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[\[FN5\]](#) [§ 366](#).

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[\[FN6\]](#) *Am. Jur. 2d, Elections §§ 462* to [468](#).

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[\[FN7\]](#) [§ 364](#).

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[\[FN8\]](#) *Am. Jur. 2d, Embezzlement §§ 33* to [35](#).

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[\[FN9\]](#) *Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 7* to [17](#).

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[\[FN10\]](#) *Am. Jur. 2d, Bribery §§ 11* to [13](#).

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[\[FN11\]](#) *Am. Jur. 2d, Larceny § 97*.

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[\[FN12\] State v. Metheney, 87 Ohio App. 3d 562, 622 N.E.2d 730 \(9th Dist. Medina County 1993\)](#) (to be guilty of theft in office, defendant must first be guilty of theft; evidence did not support conviction under theft statute).

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[\[FN13\] State v. Kort, 54 Wis. 2d 129, 194 N.W.2d 682 \(1972\).](#)

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[\[FN14\] State v. Tronca, 84 Wis. 2d 68, 267 N.W.2d 216 \(1978\).](#)

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[\[FN15\] State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 \(1970\).](#)

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**§ 363. Official misconduct**

**West's Key Number Digest**

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Public officers who commit official misconduct[FN1] or misconduct in office[FN2] are subject to criminal liability in some jurisdictions. Misconduct in office has been said to occur when duties imposed by law have not been properly and faithfully discharged[FN3] and as being established by showing the willful violation of a prescribed duty.[FN4]

Misconduct in public office, by statute in some states, occurs where, in the capacity as a public officer, the officer does an act that he or she knows exceeds his or her lawful authority or that he or she knows is forbidden by law to do in an official capacity.[FN5] Under other statutory provisions, a public servant is guilty of official misconduct when, with intent to obtain a benefit or to harm another: (1) the public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or (2) the public servant knowingly performs an act constituting an unauthorized exercise of official duties.[FN6] An indictment for official misconduct must, at a minimum, allege facts that would show the public official violated an identifiable statute, rule, regulation, or tenet of a professional code and demonstrate how the public officer exceeded his or her lawful authority.[FN7]

**Observation:** In enacting statutes establishing the criminal offense of official misconduct, a legislature seeks to ensure that good faith miscalculations in the exercise of official judgment do not run the risk of a criminal prosecution. The mens rea requirement is intended to protect honest error from criminal prosecution.[FN8]

Statutes proscribing official misconduct must be specific; thus, a state statute making it a crime for a public official to willfully and maliciously commit an act of misconduct, that does not specifically enumerate the types of misconduct prohibited, has been held impermissibly vague and a prosecution under such a statute violates due process of law.[FN9] A statute proscribing conduct that knowingly violates, or causes another to violate, any statute or lawfully adopted regulation or rule relating to office, has been held susceptible to arbitrary application in that it fails to limit prosecutorial discretion in any reasonable way.[FN10] However, under a statutory provision prohibiting a public officer from performing an act in excess of his or her lawful authority with the intent to obtain a personal advantage, a violation of the state constitution is a sufficient unlawful offense to constitute official misconduct, notwithstanding provisions of a criminal code stating that no conduct constitutes an offense unless it is described as an offense in a state statute.[FN11]

One generally must be a public official[FN12] or a public servant[FN13] in order to be prosecuted for misconduct in office. The existence of a duty owed to the public is essential to be liable for misconduct in office, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official.[FN14] There must be a connection between the official misconduct charged and the duties of the office.[FN15]

While some courts hold that a corrupt motive or intent is not an essential element of the offense,[FN16] other courts require a corrupt intent.[FN17]

It is not essential that pecuniary damage result to the public from an officer's conduct.[FN18]

## CUMULATIVE SUPPLEMENT

### Cases:

Term "law" carries the same meaning under both subsections of "official misconduct" statute, providing that public officer or employee commits misconduct when, in his official capacity, he intentionally or recklessly fails to perform any mandatory duty as required by law or he knowingly performs an act which he knows he is forbidden by law to perform. S.H.A. [720 ILCS 5/33-3\(a, b\)](#). [People v. Dorrough, 348 Ill. Dec. 401, 944 N.E.2d 354 \(App. Ct. 1st Dist. 2011\)](#).

**[END OF SUPPLEMENT]**

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[FN1] [State v. Moine, 128 Or. App. 530, 877 P.2d 94 \(1994\).](#)

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[FN2] [State v. Egan, 287 So. 2d 1 \(Fla. 1973\); Duncan v. State, 282 Md. 385, 384 A.2d 456 \(1978\); State v. Hess, 279 S.C. 14, 301 S.E.2d 547 \(1983\); State v. Kort, 54 Wis. 2d 129, 194 N.W.2d 682 \(1972\).](#)

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[FN3] [State v. Hess, 279 S.C. 14, 301 S.E.2d 547 \(1983\).](#)

- As to failure to perform, see [§ 364](#).

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[FN4] [Makwinski v. State, Bd. of Com'rs, Consol. Police and Firemen's Pension Fund, Division of Pensions, Dept. of Treasury, 76 N.J. 87, 385 A.2d 1227 \(1978\).](#)

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[FN5] [State v. Kort, 54 Wis. 2d 129, 194 N.W.2d 682 \(1972\).](#)

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[FN6] [State v. Moine, 128 Or. App. 530, 877 P.2d 94 \(1994\).](#)

- As to failure to perform, see [§ 364](#).

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[FN7] [People v. Grever, 222 Ill. 2d 321, 305 Ill. Dec. 573, 856 N.E.2d 378 \(2006\).](#)

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[FN8] [People v. Feerick, 93 N.Y.2d 433, 692 N.Y.S.2d 638, 714 N.E.2d 851 \(1999\).](#)

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[FN9] [State v. Adams, 254 Kan. 436, 866 P.2d 1017 \(1994\).](#)

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[FN10] [State v. DeLeo, 356 So. 2d 306 \(Fla. 1978\).](#)

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[FN11] [People v. Howard, 228 Ill. 2d 428, 320 Ill. Dec. 868, 888 N.E.2d 85 \(2008\).](#)

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[FN12] [State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 \(1994\)](#), stating that, at common law, one must be a public official in order to be prosecuted for misconduct in office.

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[FN13] [State v. Vickery, 275 N.J. Super. 648, 646 A.2d 1159 \(Law Div. 1994\).](#)

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[FN14] [State v. Hess, 279 S.C. 14, 301 S.E.2d 547 \(1983\).](#)

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[FN15] [State v. Dugan, 793 N.E.2d 1034 \(Ind. 2003\); People v. Perkins, 468 Mich. 448, 662 N.W.2d 727 \(2003\).](#)

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[\[FN16\] State v. Egan, 287 So. 2d 1 \(Fla. 1973\); Makwinski v. State, Bd. of Com'rs, Consol. Police and Firemen's Pension Fund, Division of Pensions, Dept. of Treasury, 76 N.J. 87, 385 A.2d 1227 \(1978\).](#)

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[\[FN17\] Duncan v. State, 282 Md. 385, 384 A.2d 456 \(1978\); People v. Perkins, 468 Mich. 448, 662 N.W.2d 727 \(2003\).](#)

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[\[FN18\] State v. Egan, 287 So. 2d 1 \(Fla. 1973\).](#)

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## **§ 364. Failure to perform; dereliction of duty**

### **West's Key Number Digest**

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Willful neglect or failure of a public officer to perform any duty that the law requires a public officer to perform is an indictable offense at common law[\[FN1\]](#) and, by statute in some jurisdictions, is punishable as a misdemeanor.[\[FN2\]](#)

Such a statute may state that no public servant may recklessly fail to perform a duty expressly imposed by law with respect to his or her office, or recklessly do any act expressly forbidden by law with respect to that office;[\[FN3\]](#) or that a public servant may not knowingly, arbitrarily, and capriciously refrain from performing a duty imposed by law or clearly inherent in the nature of the office.[\[FN4\]](#)

If the duty that has not been performed is one involving discretion, the failure to perform it is not per se an indictable offense in the absence of willful and corrupt motives.[\[FN5\]](#)

**Practice Tip:** Statutes making official misconduct a criminal offense sometimes require showings of both general and specific intent of the official to establish the offense.[\[FN6\]](#)

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[\[FN1\] Donnelley v. U.S., 276 U.S. 505, 48 S. Ct. 400, 72 L. Ed. 676 \(1928\); State v. Egan, 287 So. 2d 1 \(Fla. 1973\).](#)

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[\[FN2\] State v. Egan, 287 So. 2d 1 \(Fla. 1973\).](#)

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[\[FN3\] State v. Metheney, 87 Ohio App. 3d 562, 622 N.E.2d 730 \(9th Dist. Medina County 1993\)](#) (crime called "dereliction of duty").

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[\[FN4\] People v. Beruman, 638 P.2d 789 \(Colo. 1982\)](#) (language "duly imposed upon him by law" was not unconstitutionally vague).

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[\[FN5\] State v. Egan, 287 So. 2d 1 \(Fla. 1973\).](#)

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[\[FN6\] Bauer v. State, 609 So. 2d 608 \(Fla. Dist. Ct. App. 4th Dist. 1992\).](#)

- For discussion of general and specific intent as elements of criminal offenses, see [Am. Jur. 2d, Criminal Law § 122](#).

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**§ 365. Malfeasance in office or by public officer**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

"Malfeasance," for purposes of criminal liability for malfeasance in office or malfeasance by a public officer, has been said to consist of the doing of an act that is wholly wrongful and unlawful,[\[FN1\]](#) where such act may affect or is connected with official duties,[\[FN2\]](#) accompanied by some evil intent or motive, or where it is done with such gross negligence as to be equivalent to fraud.[\[FN3\]](#) It involves an act that the officer has no authority to do.[\[FN4\]](#)

Malfeasance in office cannot be charged unless there has been a breach of a positive statutory duty or the performance of a discretionary act with an improper or corrupt motive.[\[FN5\]](#)

**CUMULATIVE SUPPLEMENT**

**Cases:**

City council member was entitled to legislative immunity in prosecution for bribery, malfeasance in office, nonfeasance in office, and perjury, under statute providing that civil or criminal action could not be brought against city council member for words spoken at meeting of council; evidence alleged in indictment involved legislative acts of council member with regard to council's approval of financing for private land development project. [West's Ann.Md.Code, Courts and Judicial Proceedings, § 5-501. State v. Holton, 193 Md. App. 322, 997 A.2d 828 \(2010\).](#)

**[END OF SUPPLEMENT]**

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[\[FN1\] People v. Schneider, 133 Colo. 173, 292 P.2d 982 \(1956\)](#) (statutory liability); [State v. Kilmer, 194 Neb. 434, 231 N.W.2d 708 \(1975\)](#) (under common law).

- Malfeasance, as distinguished from nonfeasance of a ministerial duty, is the wrongful or unjust doing of some act that the doer has no right to perform. [State v. Winne, 21 N.J. Super. 180, 91 A.2d 65 \(Law Div. 1952\)](#), judgment rev'd on other grounds, [12 N.J. 152, 96 A.2d 63 \(1953\)](#).

[\[FN2\] Wallace v. State, 58 Del. 521, 211 A.2d 845 \(1965\).](#)

- The offense of malfeasance, or malpractice, in office, is committed only when there is a close connection between the wrongful acts and the defendant's performance of official duties. [Sweeney v. Balkcom, 358 F.2d 415 \(5th Cir. 1966\) \(applying Georgia law\).](#)

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[\[FN3\] Raduszewski v. Superior Court In and For New Castle County, 232 A.2d 95 \(Del. 1967\).](#)

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[\[FN4\] People v. Schneider, 133 Colo. 173, 292 P.2d 982 \(1956\).](#)

- As to malfeasance as grounds for removal of a public officer, see [§ 185](#).

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[\[FN5\] People v. Schneider, 133 Colo. 173, 292 P.2d 982 \(1956\).](#)

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**§ 366. Official oppression**

**West's Key Number Digest**

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### [What constitutes offense of official oppression, 83 A.L.R.2d 1007](#)

By statute in some jurisdictions, the crime of official oppression has been described as conduct by a person acting or purporting to act in an official capacity or purported capacity who (1) subjects another to arrest, detention search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or (2) denies or impedes another in the exercise or employment of any right, privilege, power or immunity;[\[FN1\]](#) or an official intentionally subjecting another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that the official knows is unlawful;[\[FN2\]](#) or an official willfully and corruptly oppressing any person, under pretense of acting in an official capacity.[\[FN3\]](#)

One must be a public servant acting under color of his or her own office or employment to be guilty of official oppression.[\[FN4\]](#)

**Practice Tip:** The use of the term "mistreatment" in a statute defining official oppression, examined in light of a prison official's charged conduct of striking and kicking inmates, did not render the provision impermissibly vague, where the accused should reasonably have understood that his conduct was proscribed by that term.[\[FN5\]](#) Furthermore, a statute that defined the offense of official oppression was not void for vagueness or overbreadth in that the term "mistreatment" was qualified such that only unlawful forms of mistreatment were proscribed.[\[FN6\]](#)

A sexual harassment provision of an official oppression statute proscribing intentional, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," is not unconstitutionally vague. The phrase, modified by the required culpable mental state, reasonably informs citizens of the proscribed conduct and provides adequate guidelines for enforcement.[\[FN7\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Property owner detained by police during execution of search warrant failed to show that he was a "prisoner" for purposes California Penal Code section prohibiting willful inhumanity or oppression towards a prisoner. [West's Ann.Cal.Penal Code § 147](#). [Young v. City of Visalia, 687 F. Supp. 2d 1155 \(E.D. Cal. 2010\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\]](#) [Com. v. Manlin, 270 Pa. Super. 290, 411 A.2d 532 \(1979\)](#).

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[\[FN2\]](#) [Blasingame v. State, 706 S.W.2d 682 \(Tex. App. Houston 14th Dist. 1986\)](#), petition for discretionary review refused, (Oct. 15, 1986).

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[\[FN3\] Coffey v. State, 207 Tenn. 260, 339 S.W.2d 1, 83 A.L.R.2d 1000 \(1960\).](#)

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[\[FN4\] State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 \(1967\)](#) (describing the common law crime of official corruption); [Blasingame v. State, 706 S.W.2d 682 \(Tex. App. Houston 14th Dist. 1986\)](#), petition for discretionary review refused, (Oct. 15, 1986).

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[\[FN5\] Com. v. Manlin, 270 Pa. Super. 290, 411 A.2d 532 \(1979\).](#)

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[\[FN6\] Zuniga v. State, 664 S.W.2d 366 \(Tex. App. Corpus Christi 1983\).](#)

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[\[FN7\] Sanchez v. State, 995 S.W.2d 677 \(Tex. Crim. App. 1999\).](#)

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**§ 367. Interest in public contracts**

**West's Key Number Digest**



Statutes sometimes make it a criminal offense for a public officer to be directly or indirectly interested in any contract or the performance of any work in the making or letting of such contract which such officer might be called upon to act or vote.[\[FN1\]](#) The mere fact that a governmental body may be interested in acquiring property in which a public official has a personal interest does not, by itself, invoke the sanctions of such statutes. However, if the interest of the governmental body intensifies to the extent that serious negotiations and discussions regarding the property ensue and the public official has an opportunity to influence the negotiation in any way, the statute is violated.[\[FN2\]](#) To claim that any violation of the law does not occur until a contract has been entered into would emaciate the statute and vitiate its legislative purpose. The law would no longer effectively deter a self-dealing official from engaging in negotiations with other parties for the purpose of purchasing property in which he or she also had a personal interest. This would permit the official to sell his or her interest at a time when making of the contract had advanced to a point where it assuredly would be executed.[\[FN3\]](#)

The interest in a contract contemplated by the statute must be one that accrues to the officer personally and not in a representative capacity, such as that of receiver, trustee, or administrator; however, a public officer's interest as a shareholder of a corporation with which he or she enters into a public contract may be sufficient to render the officer criminally liable.[\[FN4\]](#) To incur criminal liability under such statutes, a public official must act both willfully and knowingly; an official who purposefully makes a contract acts "willfully," and to act "knowingly," an official must be aware that there is reasonable likelihood that the contract may result in a personal financial benefit to the officeholder.[\[FN5\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Evidence that city official received \$100,000 to influence the city's negotiations with third party regarding its lease at municipal airport, voted on extension of another airport lease for company related to third party, and would not have championed third parties' cause without remuneration, supported finding that official had a financial interest those in amending first lease, and extending second lease, for purposes of statute proscribing a public official from having a financial interest in any contract made by him in his official capacity. [West's Ann.Cal.Gov.Code § 1090](#). [People v. Wong](#), 186 Cal. App. 4th 1433, 113 Cal. Rptr. 3d 384 (2d Dist. 2010).

### [END OF SUPPLEMENT]

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[\[FN1\]](#) [People v. Savaiano](#), 66 Ill. 2d 7, 3 Ill. Dec. 836, 359 N.E.2d 475 (1976).

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[\[FN2\]](#) [People v. Savaiano](#), 66 Ill. 2d 7, 3 Ill. Dec. 836, 359 N.E.2d 475 (1976).

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[\[FN3\]](#) [People v. Savaiano](#), 66 Ill. 2d 7, 3 Ill. Dec. 836, 359 N.E.2d 475 (1976).

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[\[FN4\] State v. Robinson, 71 N.D. 463, 2 N.W.2d 183, 140 A.L.R. 332 \(1942\).](#)

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[\[FN5\] People v. Chacon, 40 Cal. 4th 558, 53 Cal. Rptr. 3d 876, 150 P.3d 755 \(2007\); D'Amato v. Superior Court, 167 Cal. App. 4th 861, 84 Cal. Rptr. 3d 497 \(4th Dist. 2008\), review denied, \(Jan. 14, 2009\).](#)

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## § 368. Defenses

### West's Key Number Digest

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Public officers may not be held criminally liable for failure to perform a duty commanded by law when, for causes beyond their control, performance is impossible.[\[FN1\]](#) Nor may an officer be prosecuted criminally for failure to obey an order that has lost its validity through annulment by the issuing board.[\[FN2\]](#)

Statutory provisions sometimes grant immunity from criminal liability to public officers or employees engaged in specified conduct.[\[FN3\]](#) However, the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an act of Congress.[\[FN4\]](#)

**Practice Tip:** In federal court, a motion to dismiss under [Fed. R. Crim. P. 12\(b\)](#) is the proper vehicle by which to assert the defense of immunity under the Supremacy Clause of the United States Constitution.<sup>[FN5]</sup> When the Supremacy Clause is raised as a defense by a federal officer charged with a state crime, the court has a duty to make a prompt ruling on that issue; if the state fails to come forward with any evidentiary showing that disputed issues of fact exist to rebut the claim of the federal officer, the district court should sustain the defense.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Rider v. U.S., 178 U.S. 251, 20 S. Ct. 838, 44 L. Ed. 1057 \(1900\).](#)

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<sup>[FN2]</sup> [State ex rel. Robertson Inv. Co. v. Patterson, 47 Wyo. 416, 38 P.2d 617, 98 A.L.R. 428 \(1934\).](#)

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<sup>[FN3]</sup> [Falk v. Martel, 210 Ill. App. 3d 557, 155 Ill. Dec. 248, 569 N.E.2d 248 \(3d Dist. 1991\)](#) (participant in good faith in the making or investigating of a neglected child report or retaining a child in temporary protective custody is immune from criminal or civil liability).

- As to civil liability and immunity of public officers and employees generally, see §§ [295](#) to [361](#).

- As to civil liability of social workers involved in the placement of children, see [§ 313](#).

- As to dependent and neglected children, and the disposition of such children generally, see [Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children §§ 1 et seq.](#)

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<sup>[FN4]</sup> [O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 \(1974\).](#)

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<sup>[FN5]</sup> [Com. of Ky. v. Long, 837 F.2d 727 \(6th Cir. 1988\).](#)

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<sup>[FN6]</sup> [Com. of Ky. v. Long, 837 F.2d 727 \(6th Cir. 1988\).](#)

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**§ 369. Agreements or attempts to influence members of Congress; use of federal funds to influence adoption of various measures**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

An officer or employee of the United States, acting on behalf of the United States or any federal agency, who directly or indirectly makes or enters into any contract, bargain, or agreement with any member of Congress, either before or after he or she has qualified, may be fined under a criminal statute.[\[FN1\]](#)

Federal officers or employees who violate or attempt to violate a federal prohibition of the unauthorized use, directly or indirectly, of any money appropriated by Congress to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, a jurisdiction, or an official of any government, to favor or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such items, are subject to fine, imprisonment, or both.[\[FN2\]](#) Although the statute contains broad precatory language, it applies only to federal departments or agencies and their officers or employees; a state legal services corporation and its personnel are not federal agencies or officers subject to its provisions.[\[FN3\]](#)

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[\[FN1\]](#) [18 U.S.C.A. § 432.](#)

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[\[FN2\]](#) [18 U.S.C.A. § 1913.](#)

- As to lobbying generally, see [Am. Jur. 2d, Lobbying §§ 1 et seq.](#)

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[\[FN3\]](#) [Grassley v. Legal Services Corp., 535 F. Supp. 818 \(S.D. Iowa 1982\).](#)

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## **§ 370. Acting as agent or attorney in federal matter**

### **West's Key Number Digest**

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Members or members-elect of Congress who practice in the U.S. Court of Federal Claims or the U.S. Court of Appeals for the Federal Circuit are subject to criminal penalties as specified by statute.<sup>[FN1]</sup> Furthermore, it is a criminal offense for an officer or employee of the United States, in any branch or agency, or an agency of the District of Columbia, to act as an agent or attorney for prosecuting any claim against the United States, except in the discharge of official duties.<sup>[FN2]</sup> In addition, any officer or employee of the United States in any branch or agency who, other than in the proper discharge of official duties, acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest,<sup>[FN3]</sup> is subject to criminal penalties as set forth by statute.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [18 U.S.C.A. § 204](#), as discussed generally, in [Am. Jur. 2d, Federal Courts § 1970](#).

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<sup>[FN2]</sup> [18 U.S.C.A. § 205\(a\)](#), (b), as discussed in [Am. Jur. 2d, Federal Courts § 1970](#).

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[\[FN3\] 18 U.S.C.A. § 205\(a\)\(2\).](#)

- Similar provision is made specifically with regard to officers or employees of the District of Columbia and officers and employees of the Office of the United States Attorney for the District of Columbia. [18 U.S.C.A. § 205\(b\).](#)

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[\[FN4\] 18 U.S.C.A. § 205\(a\).](#)

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## **§ 371. Participation in government matters in which one holds financial interest**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

With certain statutory exceptions,[\[FN1\]](#) federal officers and employees in the executive branch, independent agencies, and certain others, and officers and employees of the District of Columbia, may not participate personally and substantially, in their capacity as government officers or employees, in proceedings, applications, requests for rulings, contracts, claims, controversies, charges, accusations, arrests, or any other matter, in which a financial interest is held by themselves, or by members of their families, business partners, or corporations or organizations in which they are

involved (including arrangements concerning prospective employment). Such officers and employees are subject to criminal penalties as specified by statute.<sup>[FN2]</sup> This statute has been held not unconstitutionally vague.<sup>[FN3]</sup> It has been stated that specific intent is not a requisite element of the provision.<sup>[FN4]</sup>

It has been held that the statute is also violated where a person who is a civil servant of long tenure, while officially engaged in his or her duties, negotiates for and consummates an agreement of employment with a private firm, to become effective upon governmental retirement.<sup>[FN5]</sup> It is also improper for a prosecutor to participate in a case where he or she has a pecuniary interest in the outcome.<sup>[FN6]</sup> The statute does not, however, bar government employees from participating in contract discussions, negotiations, or evaluations merely because, at an earlier time, they had some general discussions with some of the bidders about possible employment.<sup>[FN7]</sup>

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<sup>[FN1]</sup> 18 U.S.C.A. § 208(b).

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<sup>[FN2]</sup> 18 U.S.C.A. § 208(a).

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<sup>[FN3]</sup> *U.S. v. Nevers*, 7 F.3d 59 (5th Cir. 1993).

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<sup>[FN4]</sup> *U.S. v. Lord*, 710 F. Supp. 615 (E.D. Va. 1989), judgment aff'd, 902 F.2d 1567 (4th Cir. 1990) (referring to 18 U.S.C.A. § 208(a)).

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<sup>[FN5]</sup> *U.S. v. Conlon*, 661 F.2d 235 (D.C. Cir. 1981).

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<sup>[FN6]</sup> *U.S. v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981).

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<sup>[FN7]</sup> *C.A.C.I., Inc.-Federal v. U.S.*, 719 F.2d 1567, 71 A.L.R. Fed. 338 (Fed. Cir. 1983).

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**§ 372. Compensation for government work paid by nongovernmental payor**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

Other than as provided by law for the proper discharge of official duties, members of Congress, or members-elect, who directly or indirectly demand, seek, receive, accept, or agree to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another, is subject to criminal penalties.[FN1] The same is true for officers, employees, and federal judges of the United States in any branch, or in any agency of the United States, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission.[FN2] Similar provisions apply to officers or employees of the District of Columbia.[FN3] Limitations are placed on the liability of officers and employees, including special government employees, for some such conduct.[FN4] Knowledge by the person committing a crime that he or she is a covered employee of the government is not an element of the statute.[FN5]

Other than in the proper discharge of official duties, a federal employee may not receive any gratuity, or any share of or interest in any claim against the United States, in consideration of assistance in the prosecution of such claim,[FN6] and is subject to criminal penalties as specified by statute.[FN7]

With specified exceptions,[FN8] a federal government employee in the executive branch or an independent agency, or a District of Columbia employee, may not receive any salary, or any contribution or supplementation to salary, from any source other than the federal government, except as contributed out of the treasury of a state, county, or municipality; such person is subject to penalties as specified by statute.[FN9] The subjective intent of the organization or employee in making or accepting the payment is not relevant to whether there has been a violation of the statute.[FN10] The statute does not apply to a severance payment that is made to encourage the payee to accept government employment and is made before the payee becomes a government employee.[FN11]

Specific provisions prohibiting outside compensation pertain to inspectors of vessels,[FN12] and bank and farm credit examiners.[FN13]



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[\[FN1\] 18 U.S.C.A. § 203\(a\)\(1\)\(A\).](#)

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[\[FN2\] 18 U.S.C.A. § 203\(a\)\(1\)\(B\).](#)

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[\[FN3\] 18 U.S.C.A. § 203\(b\).](#)

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[\[FN4\] 18 U.S.C.A. § 203\(c\) to \(f\).](#)

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[\[FN5\] U.S. v. Baird, 29 F.3d 647, 39 Fed. R. Evid. Serv. 1195 \(D.C. Cir. 1994\).](#)

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[\[FN6\] 18 U.S.C.A. § 205\(a\)\(1\).](#)

- Similar provisions are made by statute with regard to such conduct by officers or employees of the District of Columbia or officers or employees of the Office of the United States Attorney for the District of Columbia. [18 U.S.C.A. § 205\(b\)\(1\).](#)

- As to the District of Columbia generally, see [Am. Jur. 2d, District of Columbia §§ 1 et seq.](#)

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[\[FN7\] 18 U.S.C.A. § 205\(a\).](#)

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[\[FN8\] 18 U.S.C.A. § 209\(c\) to \(h\).](#)

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[\[FN9\] 18 U.S.C.A. § 209\(a\)](#), also penalizing persons or bodies making contributions to, or in supplementing the salary of any such officer or employee under circumstances which would make its receipt a violation of the provision.

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[\[FN10\] U.S. v. Project on Gov't Oversight, 543 F. Supp. 2d 55 \(D.D.C. 2008\).](#)

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[\[FN11\] Crandon v. U.S., 494 U.S. 152, 110 S. Ct. 997, 108 L. Ed. 2d 132 \(1990\).](#)

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[\[FN12\] 18 U.S.C.A. § 1912.](#)

- As to inspection of ships and boats generally, see [Am. Jur. 2d, Shipping §§ 63 to 65](#); [Am. Jur. 2d, Boats and Boating § 15.](#)

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[\[FN13\] 18 U.S.C.A. § 1909.](#)

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## § 373. Disclosure of information

### West's Key Number Digest

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The Federal Trade Secrets Act imposes criminal sanctions on federal officials and employees who disclose, to any extent not authorized by law, any confidential information coming to them in the course of their employment.[FN1]

Various federal laws prohibit disclosure of particular information by particular officers. In this regard, various government workers who gain information that might influence or affect the market value of crops, which is required to be withheld from publication until a fixed time, who disclose such information to one not entitled to receive it, are subject to fine, imprisonment, or both, as specified by statute.[FN2] Various government workers with access to bank examination report information who disclose the names of borrowers or the collateral for loans to other than the proper officers of the institution that has been examined, without first obtaining express permission from the institution or from various governmental bank regulatory agencies, unless ordered to do so by a court or by Congress[FN3] are subject to fine or imprisonment for not more than one year, or both.[FN4]

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[FN1] [18 U.S.C.A. § 1905](#), discussed at [Am. Jur. 2d, Freedom of Information Acts § 165](#).

[\[FN2\] 18 U.S.C.A. § 1902.](#)

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[\[FN3\] 31 U.S.C.A. § 714.](#)

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[\[FN4\] 18 U.S.C.A. §§ 1906, 1907.](#)

- As to disqualification from holding office as a farm credit examiner, based on conduct prohibited by [18 U.S.C.A. § 1907](#), see [§ 56](#).

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## **§ 374. Speculation based on agricultural information**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

Various government workers who gain access to information that might affect the market value of crops, which information is prohibited to be published until made public through regular official channels, may not speculate in those

products by buying or selling them in any quantity, and are subject to fine, imprisonment, or both, as specified by statute.[\[FN1\]](#) Those who administer crop insurance programs may not speculate in any agricultural commodity or product to which such programs apply, or in contracts relating to them, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product; doing so may subject them to fine, imprisonment, or both.[\[FN2\]](#)

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[\[FN1\] 18 U.S.C.A. § 1902.](#)

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[\[FN2\] 18 U.S.C.A. § 1903.](#)

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**§ 375. Making false reports or records, or failing to make such reports or records; improper vouchers**

**West's Key Number Digest**

Federal bookkeepers and recordkeepers who, with intent to deceive, mislead, injure, or defraud, makes false or fictitious entries or records in the course of their duties are subject to criminal punishment.[\[FN1\]](#) Federal workers charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust any moneys or securities, who, with improper intent, make false reports of such moneys or securities, are also subject to criminal punishment.[\[FN2\]](#) A federal officer who neglects or refuses to make any return or report required to be made at stated times by any act of Congress or regulation of the Department of the Treasury, other than his or her own accounts, within the time prescribed by such act or regulation, is subject to a fine, as prescribed by statute.[\[FN3\]](#) A federal officer or employee whose duties require the compilation or report of statistics or information relating to crops, who knowingly misreports such statistics or information, is subject to a fine or imprisonment, or both.[\[FN4\]](#)

A federal officer or employee charged with the responsibility for making reports to the Secretary of Labor of government employee injuries[\[FN5\]](#) and who willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forgo the filing of any claim for compensation,[\[FN6\]](#) or certain other related acts, is subject to fine, imprisonment, or both, as specified by statute.[\[FN7\]](#)

An officer charged with the disbursement of the public moneys who accepts, receives, or transmits to the Government Accountability Office, to be allowed in his or her favor, any receipt or voucher from a creditor of the United States without having paid the full amount specified therein to such creditor is subject to fine, imprisonment, or both, as specified by statute.[\[FN8\]](#)

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[\[FN1\]](#) [18 U.S.C.A. § 2073.](#)

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[\[FN2\]](#) [18 U.S.C.A. § 2073.](#)

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[\[FN3\]](#) [18 U.S.C.A. § 2075.](#)

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[\[FN4\]](#) [18 U.S.C.A. § 2072.](#)

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[\[FN5\]](#) [5 U.S.C.A. § 8120.](#)

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[\[FN6\]](#) [5 U.S.C.A. §§ 8101](#) to [8193.](#)

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[\[FN7\]](#) [18 U.S.C.A. § 1922.](#)

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[\[FN8\]](#) [18 U.S.C.A. § 651.](#)

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**§ 376. Custodian's concealment, removal, destruction, or falsification of filed documents, records, or reports**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

A federal officer or employee who has custody of any proceeding, map, book, document, paper, or other thing filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, and who willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys such item, is subject to a fine or imprisonment, or both.<sup>[FN1]</sup> Conviction under this provision has been said to require a jury to find subjective knowledge of unlawfulness.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [18 U.S.C.A. § 2071\(b\)](#).

- National Security Council is "public" office within the meaning of the statute, even though not a governmental office to which the public customarily comes; destruction of memoranda concerning the Iran-Contra affair comes under statute. [U.S. v. Poindexter, 725 F. Supp. 13 \(D.D.C. 1989\)](#).

- As to removal, destruction, or falsification of records and reports generally, see [Am. Jur. 2d, Records and Recording Laws §§ 11, 12](#).

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[\[FN2\] § 400](#).

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**§ 377. Conduct of former officers or employees**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [120.1](#) to [122](#)

**A.L.R. Library**

[Limitation, under 18 U.S.C.A. § 207, on participation of former federal government officers and employees in proceedings involving federal government, 71 A.L.R.Fed. 360](#)

Former federal officers and employees who knowingly make, with the intent to influence, any communication to, or appearance before, any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person, except the United States or the District of Columbia, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest,[FN1] in which the person participated personally and substantially as an officer or employee,[FN2] and which involved a specific party or specific parties at the time of such participation,[FN3] will be punished as provided by statute.[FN4] Certain conduct concerning matters under official responsibility are also made punishable by statute, when made within two years after the termination of the federal officer's or employee's service or employment with the United States or the District of Columbia.[FN5] Other specific restrictions subject to punishment are detailed with regard to certain former federal officers or employees, or particular circumstances.[FN6] The restrictions do not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a state or local government.[FN7] Furthermore, other specific exceptions are specified by statute.[FN8]

The President may grant a waiver of a restriction imposed by the statute to specified officers or employees if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the federal government.[FN9] A waiver so granted to any person will, with specified exceptions,[FN10] apply only with respect to activities engaged in by that person after that person's federal government employment is terminated and only to that person's employment at a government-owned, contractor-operated entity with which the person served as an officer or employee immediately before the person's federal government employment began.[FN11]

Executive agencies must notify members of the Senior Executive Service and other employees in senior positions of certain post-employment conflict-of-interest restrictions. Agencies must provide written notification to affected employees of the new salary-based threshold for determining the applicability of the post-employment conflict-of-interest restrictions.[FN12]

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[FN1] 18 U.S.C.A. § 207(a)(1)(A).

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[FN2] 18 U.S.C.A. § 207(a)(1)(B).

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[FN3] 18 U.S.C.A. § 207(a)(1)(C).

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[FN4] 18 U.S.C.A. § 207(a)(1).

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[FN5] 18 U.S.C.A. § 207(a)(2).

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[FN6] 18 U.S.C.A. § 207(b) to (g).

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[FN7] 18 U.S.C.A. § 207(j)(1).

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[\[FN8\] 18 U.S.C.A. § 207\(j\)\(2\) to \(5\).](#)

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[\[FN9\] 18 U.S.C.A. § 207\(k\)\(1\)\(A\).](#)

- Waivers may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President. [18 U.S.C.A. § 207\(k\)\(2\).](#)

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[\[FN10\] 18 U.S.C.A. § 207\(k\)\(1\)\(B\)\(ii\).](#)

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[\[FN11\] 18 U.S.C.A. § 207\(k\)\(1\)\(B\)\(i\).](#)

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[\[FN12\] 5 C.F.R. §§ 730.101 et seq.](#)

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### **Primary Authority**

[Fed. R. Civ. P. 17](#), [25](#)

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West's A.L.R. Digest, [Federal Civil Procedure](#) [219](#), [361](#)<sup>1</sup>

West's A.L.R. Digest, Federal Courts §§[574](#)

West's A.L.R. Digest, Judgments §§[703](#)

West's A.L.R. Digest, [Officers and Public Employees](#) [94](#), [114](#)<sup>4</sup>, [119](#)<sup>9</sup>

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## **§ 378. Availability of remedies against public officers and employees**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

In certain instances injunctions[[FN1](#)] or writs of mandamus[[FN2](#)] may issue against public officers. Quo warranto is generally the remedy to determine the right or title to a public office.[[FN3](#)]

The Civil Service Reform Act[[FN4](#)] is federal employees' exclusive remedy for all prohibited personnel actions.[[FN5](#)]

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[[FN1](#)] [Am. Jur. 2d, Injunctions §§ 159 et seq.](#)

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[[FN2](#)] [Am. Jur. 2d, Mandamus §§ 90 et seq.](#)

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[[FN3](#)] [Am. Jur. 2d, Quo Warranto § 1.](#)

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[FN4] Generally, discussed in [Am. Jur. 2d, Civil Service § 4](#).

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[FN5] [Brock v. U.S., 64 F.3d 1421 \(9th Cir. 1995\)](#).

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## **§ 379. Effect of immunity on litigation and remedies**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Official immunity shelters government officials from all aspects of a lawsuit, including pretrial discovery; it is not solely a shelter from liability.[FN1] A suit against a person in his or her official capacity is, in all respects other than in name, treated as a suit against the entity for purposes of sovereign immunity analysis.[FN2] Some state tort claims acts constitute the exclusive remedy for any tort committed by a state officer or employee, and, under such an act, merely styling a suit against a public officer as one brought against the officer personally does not deprive the officer of any immunity to which he or she might otherwise be entitled for official acts.[FN3]

Immunity from damages does not ordinarily bar equitable relief.[FN4]

## CUMULATIVE SUPPLEMENT

### Cases:

Qualified immunity is immunity from suit rather than a mere defense to liability. [Jones v. Horne, 634 F.3d 588 \(D.C. Cir. 2011\)](#).

The qualified immunity privilege is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. [Smith v. Kenny, 678 F. Supp. 2d 1124 \(D.N.M. 2009\)](#).

Qualified immunity provides immunity from suit, not simply a defense to liability. [Perrea v. Cincinnati Public Schools, 709 F. Supp. 2d 628 \(S.D. Ohio 2010\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Crawford v. Kemp, 139 P.3d 1249 \(Alaska 2006\)](#); [Lexington-Fayette Urban County Government v. Smolcic, 142 S.W.3d 128 \(Ky. 2004\)](#); [Yoak v. Marshall University Bd. of Governors, 223 W. Va. 55, 672 S.E.2d 191, 241 Ed. Law Rep. 451 \(2008\)](#).

- The immunity of public officers is generally discussed in [§§ 295 et seq.](#)

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[FN2] [Middleton v. Hartman, 45 P.3d 721, 164 Ed. Law Rep. 906 \(Colo. 2002\)](#), as modified on denial of reh'g, (May 13, 2002); [Pellegrino v. State ex rel. Cameron University ex rel. Board of Regents of State, 2003 OK 2, 63 P.3d 535 \(Okla. 2003\)](#).

- As to the effect of suing an officer in his or her official capacity, generally, see [§ 386](#).

- As to sovereign immunity of states, generally, see [Am. Jur. 2d, States, Territories, and Dependencies §§ 97 et seq.](#)

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[FN3] [Coults v. Dunbar, 220 Ga. App. 54, 467 S.E.2d 373 \(1996\)](#).

- As to immunity from tort claims and actions under a tort claims act, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.](#)

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[FN4] [Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 \(1975\)](#).

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**§ 380. Effect of immunity on litigation and remedies—Time for determining issue**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Immunity issues should be decided at earliest opportunity,[[FN1](#)] or long before trial.[[FN2](#)] The question of absolute immunity should be determined at the outset of litigation, since the purpose of conferring absolute immunity is to protect officials not only from ultimate liability, but also from the time consuming aspects of a lawsuit, including discovery.[[FN3](#)] Similarly, since qualified immunity is not just a defense to liability, but an entitlement not to stand trial or face the burdens of litigation,[[FN4](#)] a ruling on a defendant public official's claim of qualified immunity in a civil action should be made early in the proceedings,[[FN5](#)] so that the time and expense of trial preparation[[FN6](#)] and other trial costs are avoided where the defense is dispositive.[[FN7](#)] Qualified immunity is a threshold issue even in a suit against the officer in his or her personal capacity.[[FN8](#)]

Although it may be better to decide whether the plaintiff has stated a claim of a constitutional deprivation before considering whether the defendant officials are entitled to qualified immunity, that is not necessary if the constitutional issue may be reached by another means, such as a suit for injunctive relief.[[FN9](#)]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Courts must resolve qualified immunity questions at the earliest possible stage in litigation. [Barnhardt v. District of Columbia, 723 F. Supp. 2d 197 \(D.D.C. 2010\)](#).

**[END OF SUPPLEMENT]**

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[FN1] [Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 \(2007\).](#)

-

[FN2] [Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 \(1991\); Clancy v. McCabe, 441 Mass. 311, 805 N.E.2d 484 \(2004\).](#)

- As to raising the issue on a motion to dismiss or for summary judgment, see [§ 394](#).

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[FN3] [District of Columbia v. Jones, 919 A.2d 604 \(D.C. 2007\).](#)

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[FN4] [Rooks v. State Through Oklahoma Corp. Com'n, 1992 OK CIV APP 155, 842 P.2d 773 \(Ct. App. Div. 3 1992\); Swedlund v. Foster, 2003 SD 8, 657 N.W.2d 39 \(S.D. 2003\); Layland v. Stevens, 2007 WY 188, 171 P.3d 1070 \(Wyo. 2007\).](#)

-

[FN5] [Vaughn v. U.S. Small Business Admin., 65 F.3d 1322, 12 A.D.D. 816, 1995 FED App. 0289P \(6th Cir. 1995\); Ryan v. Hayes, 831 So. 2d 21 \(Ala. 2002\); Swedlund v. Foster, 2003 SD 8, 657 N.W.2d 39 \(S.D. 2003\); Layland v. Stevens, 2007 WY 188, 171 P.3d 1070 \(Wyo. 2007\).](#)

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[FN6] [Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 \(1991\).](#)

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[FN7] [Ryan v. Hayes, 831 So. 2d 21 \(Ala. 2002\).](#)

- As to whether qualified immunity is lost if the case goes to trial, see [§ 315](#).

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[FN8] [Cameron v. Lang, 274 Ga. 122, 549 S.E.2d 341 \(2001\).](#)

- As to the effect of suing an officer individually, generally, see [§ 386](#).

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[FN9] [Horne v. Coughlin, 191 F.3d 244 \(2d Cir. 1999\).](#)

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**§ 381. Exhaustion of administrative remedies**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Actions against public officials[[FN1](#)] and actions in connection with government personnel matters[[FN2](#)] may be barred if applicable administrative remedies have not been first pursued.[[FN3](#)] In some instances, a public employee has been found to have agreed to the terms of personnel rules, including exhaustion requirements, and therefore to be bound by them when accepting public employment.[[FN4](#)]

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[[FN1](#)] [Friend v. Brankatelli, 19 Ohio App. 3d 64, 482 N.E.2d 1284 \(8th Dist. Cuyahoga County 1984\).](#)

-

[[FN2](#)] [Glover v. State, 860 P.2d 1169 \(Wyo. 1993\).](#)

- As to litigation involving disciplinary action against public officers and employees, generally, see [§§ 439 et seq.](#)

-

[[FN3](#)] As to the general requirement that a litigant exhaust administrative remedies prior to seeking judicial review, see [Am. Jur. 2d, Administrative Law §§ 474 et seq.](#)

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[[FN4](#)] [Glover v. State, 860 P.2d 1169 \(Wyo. 1993\).](#)

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## **§ 382. Remedies against third parties; recovery of funds illegally paid by public officers**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

### **A.L.R. Library**

[What constitutes acts affecting personal financial interest within meaning of 18 U.S.C.A. sec. 208\(a\), penalizing participation by government employees in matters in which they have personal financial interest, 59 A.L.R. Fed. 872](#)

The government is entitled to recover the amount paid to a contractor pursuant to a contract that violates a federal criminal statute<sup>[FN1]</sup> prohibiting certain conduct of federal employees in connection with Federal Government business.<sup>[FN2]</sup> However, a presumption does not arise that a corporation's purpose in employing a government employee at a better salary was to reward him for contract negotiations, where the corporation's profits were not excessive and unconscionable.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [18 U.S.C.A. § 208](#), discussed in [§ 371](#).

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<sup>[FN2]</sup> [K & R Engineering Co., Inc. v. U. S.](#), 222 Ct. Cl. 340, 616 F.2d 469 (1980).

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[\[FN3\] U.S. v. Goldfield Corp., 384 F.2d 669 \(10th Cir. 1967\).](#)

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## **§ 383. Period of limitations**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

There is authority for the view that a public official may not take advantage of a limitation period applicable to written employment contracts.[\[FN1\]](#)

With respect to a cause of action against an officer for a loss caused by the officer's delay in presenting a check given in payment of a public obligation, the applicable statute of limitations does not begin to run until a reasonable time has elapsed for the cashing of the check.[\[FN2\]](#)

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[\[FN1\] Lake County v. State ex rel. Manich, 631 N.E.2d 529 \(Ind. Ct. App. 1994\).](#)

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[\[FN2\] Kansas Amusement Co. v. Eddy, 143 Kan. 988, 57 P.2d 458, 105 A.L.R. 702 \(1936\).](#)

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## **§ 384. Generally**

### **West's Key Number Digest**

West's Key Number Digest, [Venue](#) [11](#)

### **A.L.R. Library**

[Venue of actions or proceedings against public officers, 48 A.L.R.2d 423](#)

In the absence of statutes referring particularly to the place of trial of actions against officers, the general rules of venue apply with respect to tort actions against officers.[\[FN1\]](#) Specific venue provisions have the purpose of avoiding

the need for public officers to forsake their duties to attend distant courts.[FN2] If the venue of actions against public officers is fixed by statute, an officer who objects may have an absolute right to have the action tried where specified by the statute,[FN3] or a venue provision may be permissive.[FN4] Such a statute also may confer a personal privilege on the officer, which may be waived.[FN5]

Statutes sometimes provide for the bringing of suits against public officers in the county in which the officer, or one of several officers, holds office,[FN6] in the county or district of the officer's residence or location,[FN7] or in the county where the cause of action or some part of it arose.[FN8] Courts have variously held that the cause of action arises where the decision at issue was made and filed,[FN9] the effect of the official decision or act is felt,[FN10] the alleged wrongful conduct occurred,[FN11] or the officers may be compelled to perform their duties.[FN12]

An agency may be a "public officer" under a statute on venue for actions against public officers, and that statute may apply regardless of the form of the action.[FN13] Some statutes or rules allow special actions brought against a state officer or agency to be brought either in the county of the principal office of the agency or of residence of the plaintiff,[FN14] while others require that the action be brought only in the state capital.[FN15]

## CUMULATIVE SUPPLEMENT

### Cases:

Venue for proceedings against a state official is the county of official residence. [Ex parte State Personnel Bd., 45 So. 3d 751 \(Ala. 2010\)](#).

There are two exceptions to the general rule that State officials must be sued in the county of their official residency: specific statutory authority that allows venue to be placed elsewhere, and a waiver of venue by the State official. [Little v. State, 44 So. 3d 1070 \(Ala. 2010\)](#).

Venue for grantor's action against State and governor in his official capacity to recover real property conveyed to State was proper in county of governor's official residence. [Little v. State, 44 So. 3d 1070 \(Ala. 2010\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Eck v. State Tax Commission, 204 Md. 245, 103 A.2d 850, 48 A.L.R.2d 415 \(1954\)](#).

- As to venue, generally, see [Am. Jur. 2d, Venue §§ 1 et seq.](#)  
- As to venue in actions against federal officers, see §§ [412](#) to [416](#).

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[FN2] [Wells v. Cumberland County Hosp. System, Inc., 150 N.C. App. 584, 564 S.E.2d 74 \(2002\)](#).

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[FN3] [Bergin v. Temple, 111 Mont. 539, 111 P.2d 286, 133 A.L.R. 1115 \(1941\)](#).

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[FN4] [City of Fort Worth v. Zimlich, 29 S.W.3d 62 \(Tex. 2000\)](#) (Whistleblower Act).

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[FN5] [State ex rel. Barber v. Rhodes, 165 Ohio St. 414, 60 Ohio Op. 58, 136 N.E.2d 60 \(1956\)](#).

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[FN6] [Lewis v. Planned Financial Services, Inc., 340 So. 2d 941 \(Fla. Dist. Ct. App. 4th Dist. 1976\)](#); [Talley v. Missouri Dept. of Corrections, 210 S.W.3d 212 \(Mo. Ct. App. W.D. 2006\)](#), transfer denied, (Jan. 30, 2007); [Jones v. New Mexico State Highway Dept., 92 N.M. 671, 593 P.2d 1074 \(1979\)](#).

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[FN7] [White v. Fireman's Fund Ins. Co., 233 Ga. 919, 213 S.E.2d 879 \(1975\)](#).

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[FN8] [I.S.C. Distributors, Inc. v. Trevor, 259 Mont. 460, 856 P.2d 977 \(1993\)](#); [J. J. Nugent Co. v. Sagner, 151 N.J. Super. 189, 376 A.2d 945 \(App. Div. 1977\)](#); [Pitts Fire Safety Service, Inc. v. City of Greensboro, 42 N.C. App. 79, 255 S.E.2d 615 \(1979\)](#); [Oklahoma Ordnance Works Authority v. District Court of Wagoner County, 1980 OK 100, 613 P.2d 746 \(Okla. 1980\)](#); [Stalheim v. Daskocil, 275 S.C. 252, 269 S.E.2d 346 \(1980\)](#).

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[FN9] [Ebenezer Society v. Minnesota State Bd. of Health, 301 Minn. 188, 223 N.W.2d 385 \(1974\)](#); [Oklahoma Ordnance Works Authority v. District Court of Wagoner County, 1980 OK 100, 613 P.2d 746 \(Okla. 1980\)](#); [McDonald v. State, 86 S.D. 570, 199 N.W.2d 583 \(1972\)](#).

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[FN10] [California State Parks Foundation v. Superior Court, 150 Cal. App. 4th 826, 58 Cal. Rptr. 3d 715 \(4th Dist. 2007\)](#), review denied, (July 25, 2007).

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[FN11] [Winston v. Martin, 764 So. 2d 368 \(La. Ct. App. 2d Cir. 2000\)](#), writ granted and transferred, [776 So. 2d 1179 \(La. 2000\)](#), order amended on reconsideration on other grounds, [776 So. 2d 1180 \(La. 2001\)](#).

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[FN12] [Anderson v. State, 916 So. 2d 431 \(La. Ct. App. 3d Cir. 2005\)](#), writ denied, [929 So. 2d 1243 \(La. 2006\)](#).

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[FN13] [California State Parks Foundation v. Superior Court, 150 Cal. App. 4th 826, 58 Cal. Rptr. 3d 715 \(4th Dist. 2007\)](#), review denied, (July 25, 2007).

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[FN14] [Bishop v. Marks, 117 Ariz. 50, 570 P.2d 821 \(Ct. App. Div. 2 1977\)](#).

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[FN15] [State ex rel. Stewart v. Alsop, 207 W. Va. 430, 533 S.E.2d 362 \(2000\)](#).

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**§ 385. Effect of joinder of parties**

**West's Key Number Digest**

West's Key Number Digest, [Venue](#) [11](#)

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[Venue of actions or proceedings against public officers, 48 A.L.R.2d 423](#)

The joinder of codefendants who reside outside the county where the cause of action against the public officer arose does not change the statutory rule that the action must be commenced where the cause of action arose.<sup>[FN1]</sup> The other defendants do not have clear legal right to have the case transferred.<sup>[FN2]</sup> Similarly, where a special statute requires that a suit against a particular public officer be brought in a certain county, the joinder of a defendant situated in another county does not justify bringing suit in the second county.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Birdsong v. Grubbs, 208 Miss. 123, 43 So. 2d 878 \(1950\); Taylor v. Baltimore & O. R. Co., 138 W. Va. 313, 75 S.E.2d 858 \(1953\).](#)

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<sup>[FN2]</sup> [Ex parte McDonald, 804 So. 2d 204 \(Ala. 2001\)](#) (even where the other defendants were sued first).

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<sup>[FN3]</sup> [State ex rel. Braman v. Masheter, 5 Ohio St. 2d 197, 34 Ohio Op. 2d 386, 214 N.E.2d 804 \(1966\).](#)

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## § 386. Designation in official or individual capacity

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [114](#), [119](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 3](#) (Allegation—Official capacity of plaintiff)

A suit against a public officer in his or her individual capacity means that the plaintiff seeks recovery from the defendant directly, while a suit in the officer's official capacity means that the plaintiff seeks recovery from the entity of which the defendant is an agent.<sup>[FN1]</sup> The two types of claims are distinct,<sup>[FN2]</sup> and the question is the nature of the relief sought, not the nature of the act or omission alleged,<sup>[FN3]</sup> although it has also been said that an official is liable in his or her official capacity only if a policy or custom played a part in the alleged violation.<sup>[FN4]</sup>

Generally, where a plaintiff brings an action against a public official in his or her official capacity, the suit is against the office that official represents, and not the official personally.<sup>[FN5]</sup> Suits against a government official in his or her

official capacity are just another way of pleading a suit against a government entity of which the official is an agent,[FN6] and, in this regard, it has been said that so long as that entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.[FN7] If the plaintiff seeks an injunction requiring that the public officer take an action involving the exercise of a governmental power, the defendant is named in an official capacity.[FN8]

A suit against a government employee in his or her individual capacity seeks to impose personal liability on the employee for actions taken under color of law.[FN9] A lawsuit against an officer alleging that the officer's actions are within his or her statutory powers but the powers are constitutionally void is properly brought against the officer as an individual.[FN10] A Bivens claim lies against a federal official in his or her individual capacity, not against officials in their official capacity, since Bivens authorizes suits against federal officials in their individual capacities for damages for Fourth Amendment violations, and does not impose liability on the United States.[FN11]

Under the Federal Rules of Civil Procedure, a public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name, but the court may require that the officer's name be added.[FN12]

## CUMULATIVE SUPPLEMENT

### Cases:

The real party in interest in an official-capacity § 1983 suit is the governmental entity and not the named official. [42 U.S.C.A. § 1983](#). [Aaron v. Shelley](#), 696 F. Supp. 2d 1000, 74 Fed. R. Serv. 3d 1374 (E.D. Ark. 2009).

A suit against a public official in his official capacity is merely another way of pleading an action against an entity of which an officer is an agent. [Savage v. City of Pontiac](#), 743 F. Supp. 2d 678, 77 Fed. R. Serv. 3d 907 (E.D. Mich. 2010).

Public employees, like agents generally, have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity. [Franka v. Velasquez](#), 332 S.W.3d 367 (Tex. 2011).

### [END OF SUPPLEMENT]

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[FN1] [Isenhour v. Hutto](#), 350 N.C. 601, 517 S.E.2d 121 (1999).

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[FN2] [Vela v. Rocha](#), 52 S.W.3d 398 (Tex. App. Corpus Christi 2001).

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[FN3] [Isenhour v. Hutto](#), 350 N.C. 601, 517 S.E.2d 121 (1999).

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[FN4] [Gomez v. Vernon](#), 255 F.3d 1118, 50 Fed. R. Serv. 3d 436 (9th Cir. 2001).

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[FN5] [Christy v. Pennsylvania Turnpike Com'n](#), 54 F.3d 1140 (3d Cir. 1995); [Welch v. Laney](#), 57 F.3d 1004 (11th Cir. 1995).

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[\[FN6\] Crawford v. City of Muncie, 655 N.E.2d 614 \(Ind. Ct. App. 1995\); City of Hempstead v. Kmiec, 902 S.W.2d 118 \(Tex. App. Houston 1st Dist. 1995\).](#)

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[\[FN7\] Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 \(1985\); Crawford v. City of Muncie, 655 N.E.2d 614 \(Ind. Ct. App. 1995\).](#)

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[\[FN8\] Isenhour v. Hutto, 350 N.C. 601, 517 S.E.2d 121 \(1999\).](#)

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[\[FN9\] Hidalgo County v. Gonzalez, 128 S.W.3d 788 \(Tex. App. Corpus Christi 2004\).](#)

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[\[FN10\] Walker v. Hughes, 558 F.2d 1247 \(6th Cir. 1977\).](#)

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[\[FN11\] Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225 \(10th Cir. 2005\).](#)

- Bivens is generally discussed in [Am. Jur. 2d, Constitutional Law § 104](#); [Am. Jur. 2d, Searches and Seizures §§ 305 et seq.](#)

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[\[FN12\] Fed. R. Civ. P. 17](#)(d).

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## § 387. Joinder

### West's Key Number Digest

West's Key Number Digest, [Federal Civil Procedure](#) 219

West's Key Number Digest, [Officers and Public Employees](#) 119

Joinder is generally not required of public officers who are not deemed to be necessary parties to a suit, where other named defendants can adequately represent the government body's interests.<sup>[FN1]</sup> An officer is ordinarily a necessary party to a suit where the court seeks to pass on the validity of that officer's acts.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Welsch v. Likins, 550 F.2d 1122 \(8th Cir. 1977\)](#).

- Generally, as to joinder of parties, see [Am. Jur. 2d, Parties §§ 124 et seq.](#)

- As to joinder in cases involving federal officials, see [§ 411](#).

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<sup>[FN2]</sup> [Kansas Gas & Electric Co. v. City of Independence, Kan., 79 F.2d 32, 100 A.L.R. 1479 \(C.C.A. 10th Cir. 1935\)](#).

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**§ 388. Substitution of successors in office**

**West's Key Number Digest**

West's Key Number Digest, [Federal Civil Procedure](#) [361](#)

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 4](#) (Motion—To substitute public officer's successor as plaintiff)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 5](#) (Order—Substituting public officer's successor as plaintiff)

Under the Federal Rules of Civil Procedure, an action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.<sup>[FN1]</sup>

The right to substitute the successors of officers whose terms expire pending proceedings in state court is to be determined under state law.<sup>[FN2]</sup> Substitution is proper where an action relates to the performance of a continuing duty pertaining to a public office, irrespective of the incumbent.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Fed. R. Civ. P. 25](#)(d).

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<sup>[FN2]</sup> [Charles L. Harney, Inc. v. Durkee](#), 107 Cal. App. 2d 570, 237 P.2d 561, 31 A.L.R.2d 457 (1st Dist. 1951).

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<sup>[FN3]</sup> [Phillips v. Brandt](#), 231 Minn. 423, 43 N.W.2d 285, 16 A.L.R.2d 1048 (1950).

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## § 389. Pleadings

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Complaints seeking damages against government officials are subject to a heightened standard of pleading, which requires sufficient specificity to put defendants on notice of the nature of the claim.<sup>[FN1]</sup> Since the liability of a public official may vary depending on whether the act performed was ministerial or discretionary,<sup>[FN2]</sup> it may be necessary to allege sufficient facts to support the conclusion that the act that was the subject of the lawsuit was ministerial,<sup>[FN3]</sup> or at least raise an issue whether the official's duty was ministerial, rather than quasi-judicial or quasi-legislative.<sup>[FN4]</sup>

If a plaintiff fails to advance allegations other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity and is treated as a claim against the defendant in one's official capacity.<sup>[FN5]</sup>

In an action against a public official, the defendant bears the burden of pleading good faith and establishing that he or she was acting within the scope of discretionary authority when the alleged acts occurred.<sup>[FN6]</sup>

A judgment on the pleadings is properly granted to defendant public officials, where a complaint against them failed to state a claim against the defendants individually, and the plaintiff failed to allege a waiver of governmental immunity.<sup>[FN7]</sup>

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[\[FN1\] Edgington v. Missouri Dept. of Corrections, 52 F.3d 777 \(8th Cir. 1995\).](#)

- As to pleading requirements with regard to removal of cases involving federal officers or employees from state to federal courts, see [§ 424](#).

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[\[FN2\] §§ 318 et seq.](#)

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[\[FN3\] Movable Homes, Inc. v. City of North Tonawanda, 56 A.D.2d 718, 392 N.Y.S.2d 772 \(4th Dep't 1977\).](#)

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[\[FN4\] Barillari v. City of Milwaukee, 186 Wis. 2d 415, 521 N.W.2d 144 \(Ct. App. 1994\)](#), decision rev'd on other grounds, [194 Wis. 2d 247, 533 N.W.2d 759 \(1995\)](#).

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[\[FN5\] Buchanan v. Hight, 133 N.C. App. 299, 515 S.E.2d 225 \(1999\).](#)

- As to official or individual capacity, see [§ 386](#).

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[\[FN6\] Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\).](#)

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[\[FN7\] Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 \(1993\).](#)

- Generally, as to the applicability of sovereign immunity to public officers or employees, see [§§ 303 et seq.](#)

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**§ 390. Pleadings—Official immunity**

**West's Key Number Digest**

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Being an affirmative defense,[FN1] official, qualified, or "good faith" immunity must be pleaded by the defendant officer.[FN2] Because qualified immunity is an affirmative defense, the failure to plead it may result in a waiver of the defense.[FN3]

A plaintiff, attempting to overcome a defense of qualified immunity, must plead specific facts with a level of particularity so that they would, if proved, warrant the relief sought, and must state with factual detail and particularity the bases for claiming why the defendant may not successfully maintain that defense; a mere conclusory statement evidencing a personal belief that the defendants were motivated by an impermissible animus is not sufficient.[FN4] The plaintiff must plead facts showing impermissible intent specifically,[FN5] as well as factual allegations necessary to sustain a conclusion that the defendant violated clearly established law.[FN6] Until the plaintiff both demonstrates a clearly established right and comes forward with the necessary factual allegations, the government official is properly spared the burden and expense of proceeding any further.[FN7] On the other hand, if the complaint alleges violation of a clearly established law, the suit should continue.[FN8]

The view has been followed that, to state a cause of action against a public official who has asserted an immunity defense, the plaintiff must allege malice or bad faith.[FN9] To overcome the immunity of a public official for the exercise of a discretionary function, malice must be pled with particularity.[FN10] In this regard, under the rule sometimes followed that public officers are absolutely immune from liability for discretionary acts absent a showing of malice or corruption,[FN11] a plaintiff seeking to impose liability on a public officer must allege and prove[FN12] corruption or malice when the defendant's act is in the performance of official or governmental duties involving the exercise of discretion.[FN13] Allegations of "reckless indifference" are not sufficient to satisfy a plaintiff's burden to allege evidence of corruption or malice.[FN14] However, the fact that a complaint did not specifically characterize an official's conduct as malicious or corrupt is not of significance, if the allegations necessarily entail malicious conduct, that is, the wanton and deliberate commission of a wrongful act.[FN15]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Qualified immunity defense does not vanish when district court declines to rule on the plea summarily; however, while defense remains available to defendants at trial, at that stage, defense must be evaluated in light of character and quality of evidence received in court. [Ortiz v. Jordan, 131 S. Ct. 884 \(2011\)](#).

When summary judgment is sought on qualified immunity defense, court inquires whether party opposing the motion has raised any triable issue barring summary adjudication; however, once trial has been had, availability of official immunity should be determined by trial record, not the pleadings nor the summary judgment record. [Ortiz v. Jordan](#), 131 S. Ct. 884 (2011).

**[END OF SUPPLEMENT]**

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[FN1] [Siegert v. Gilley](#), 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); [Harlow v. Fitzgerald](#), 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (qualified or "good faith" immunity); [Lightfoot v. Floyd](#), 667 So. 2d 56, 107 Ed. Law Rep. 378 (Ala. 1995); [Yanero v. Davis](#), 65 S.W.3d 510, 161 Ed. Law Rep. 1058 (Ky. 2001); [Liu v. New York City Police Dept.](#), 216 A.D.2d 67, 627 N.Y.S.2d 683 (1st Dep't 1995); [Rooks v. State Through Oklahoma Corp. Com'n](#), 1992 OK CIV APP 155, 842 P.2d 773 (Ct. App. Div. 3 1992) (stating that qualified immunity is an affirmative defense found in federal law); [Burgess v. Jaramillo](#), 914 S.W.2d 246 (Tex. App. Fort Worth 1996); [Barnhill v. Board of Regents of UW System](#), 166 Wis. 2d 395, 479 N.W.2d 917, 72 Ed. Law Rep. 623 (1992); [Abell v. Dewey](#), 870 P.2d 363 (Wyo. 1994).

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[FN2] [Siegert v. Gilley](#), 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); [Harlow v. Fitzgerald](#), 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); [Shechter v. Comptroller of City of New York](#), 79 F.3d 265 (2d Cir. 1996); [Gagan v. Norton](#), 35 F.3d 1473 (10th Cir. 1994); [L.S.T., Inc. v. Crow](#), 49 F.3d 679 (11th Cir. 1995); [Yanero v. Davis](#), 65 S.W.3d 510, 161 Ed. Law Rep. 1058 (Ky. 2001); [Aldridge v. De Los Santos](#), 878 S.W.2d 288, 92 Ed. Law Rep. 727 (Tex. App. Corpus Christi 1994), writ dismissed w.o.j., (Oct. 6, 1994); [Abell v. Dewey](#), 870 P.2d 363 (Wyo. 1994).

- For a discussion of immunity of public officers and employees, generally, see [§§ 295 et seq.](#)

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[FN3] [Bogle v. McClure](#), 332 F.3d 1347 (11th Cir. 2003); [Hill v. Dekalb Regional Youth Detention Center](#), 40 F.3d 1176 (11th Cir. 1994).

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[FN4] [Burns-Toole v. Byrne](#), 11 F.3d 1270 (5th Cir. 1994).

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[FN5] [Liu v. New York City Police Dept.](#), 216 A.D.2d 67, 627 N.Y.S.2d 683 (1st Dep't 1995).

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[FN6] [Pueblo Neighborhood Health Centers, Inc. v. Losavio](#), 847 F.2d 642 (10th Cir. 1988); [Stone v. Badgerow](#), 511 N.W.2d 747 (Minn. Ct. App. 1994).

- Once a plaintiff has identified a clearly established right that has been violated by the defendant officials, the court examines whether the plaintiff has come forward with the necessary factual allegations. [Watson v. University of Utah Medical Center](#), 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996).

- For purposes of qualified immunity, the plaintiff must do more than simply make general, conclusory allegations of some constitutional violation or state broad legal truisms. [McDaniel v. Woodard](#), 886 F.2d 311 (11th Cir. 1989).

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[FN7] [Powell v. Mikulecky](#), 891 F.2d 1454 (10th Cir. 1989); [Stone v. Badgerow](#), 511 N.W.2d 747 (Minn. Ct. App. 1994).

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[\[FN8\] Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 \(1987\).](#)

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[\[FN9\] Board of Examiners of Certified Shorthand Reporters Through Juge v. Neyrey, 542 So. 2d 56 \(La. Ct. App. 4th Cir. 1989\), writ denied, 548 So. 2d 1231 \(La. 1989\).](#)

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[\[FN10\] McCloud v. Bradley, 724 S.W.2d 362 \(Tenn. Ct. App. 1986\).](#)

- Bare allegations of malice do not suffice to subject governmental officials either to the costs of trial or to the burdens of broad-reaching discovery. [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\).](#)

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[\[FN11\] § 328.](#)

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[\[FN12\] § 392.](#)

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[\[FN13\] Jones v. Kearns, 120 N.C. App. 301, 462 S.E.2d 245 \(1995\).](#)

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[\[FN14\] Jones v. Kearns, 120 N.C. App. 301, 462 S.E.2d 245 \(1995\).](#)

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[\[FN15\] Tcherepnin v. Franz, 570 F.2d 187 \(7th Cir. 1978\).](#)

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XII. Remedies and Procedure



## A. General Principles Applying to Civil Actions

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#### § 391. Evidence, presumptions, and burden of proof

##### West's Key Number Digest

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In the absence of evidence to the contrary, the law assumes that public officials have performed their duties properly, unless the official act in question appears irregular on its face.[FN1] Thus, the burden is ordinarily on one seeking to recover damages to prove that the officer was acting in violation of the law, in excess of authority, or without regard to the functions with which the defendant was entrusted.[FN2]

The question whether the alleged misconduct of a public officer occurred while the accused was acting in a public, as opposed to a private, capacity is to be decided by the trier of fact based on all the evidence, not merely on the evidence concerning specific duties created by statute or ordinance.[FN3]

Under the rule that official misconduct constitutes an individual wrong only if the duty is owed to the party seeking redress,[FN4] once a duty is shown to exist, then a breach of the required standard of care and an injury proximately caused by the breach must be shown.[FN5] To recover from a public officer, the plaintiff must show a special and direct interest in the public employee's performance of the claimed duty.[FN6] A plaintiff must also show that the duty of the public officer or employee that caused the injury was ministerial in nature.[FN7]

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[FN1] [Am. Jur. 2d, Evidence § 221](#).

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[FN2] [Zeppi v. Beach, 229 Cal. App. 2d 152, 40 Cal. Rptr. 183 \(3d Dist. 1964\)](#); [State ex rel. and to Use of City of St. Louis v. Priest, 348 Mo. 37, 152 S.W.2d 109 \(1941\)](#).

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[FN3] [Madsen v. Brown, 701 P.2d 1086 \(Utah 1985\)](#).

- Generally, as to the determination whether a suit is brought against a public officer or employee in his or her official or individual capacity, see [§ 386](#).

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[FN4] [§ 364](#).

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[FN5] [Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 5 A.L.R.4th 757 \(1977\)](#).

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[FN6] [Rupp v. Bryant, 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 \(Fla. 1982\)](#).

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[\[FN7\] Rupp v. Bryant, 417 So. 2d 658, 5 Ed. Law Rep. 1309, 35 A.L.R.4th 253 \(Fla. 1982\).](#)

- As to the rule that public officers are only liable for actions that are ministerial, as opposed to discretionary, see [§§ 318 et seq.](#)

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## **§ 392. Evidence, presumptions, and burden of proof—Official immunity**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Official immunity is an affirmative defense[\[FN1\]](#) which must be proven by the defendant officer.[\[FN2\]](#) The burden is on the defendant to establish all elements[\[FN3\]](#) of immunity[\[FN4\]](#) by proving the relevant predicate facts.[\[FN5\]](#) The defendant must provide sufficiently specific proof that he or she had the authority to perform the acts alleged and acted in good faith and within the scope of one's authority.[\[FN6\]](#) Officials asserting qualified immunity must prove that the claims arose from a function that would entitle them to immunity.[\[FN7\]](#) Furthermore, officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy.[\[FN8\]](#)

Once the public official satisfies the burden of moving forward, the burden shifts to the plaintiff to show lack of good faith on the defendant's part,[FN9] which is met by proof demonstrating that the defendant's actions violated clearly established constitutional[FN10] or other law.[FN11] The "clearly established law" test requires a showing that a reasonable official would understand that the act in question violates a right established by preexisting law, and only then does the burden shift to the defendant to show that material facts do not remain in dispute that would defeat the claim of qualified immunity.[FN12] If an official claims that extraordinary circumstances existed and can prove, based on objective factors, that he or she neither knew nor should have known the relevant legal standard, the defense of qualified immunity should apply.[FN13] Good faith must be shown by objective evidence, and subjective evidence is not admissible.[FN14]

Officers who seek absolute immunity bear the burden of showing that public policy requires an exemption of that scope[FN15] because the presumption is that qualified, rather than absolute, immunity is sufficient to protect government officials.[FN16]

Where immunity does not apply to the discretionary acts of public officers or employees that are performed willfully, with malice, or corrupt motives,[FN17] a plaintiff seeking to impose liability on a public officer must prove corruption or malice when the defendant was performing official or governmental duties involving the exercise of discretion,[FN18] and plaintiffs may not rely on mere allegations of malice, but must present specific facts evidencing bad faith.[FN19] However, it has been said that proof of spite does not nullify a defense of immunity.[FN20]

## CUMULATIVE SUPPLEMENT

### Cases:

When summary judgment is sought on qualified immunity defense, court inquires whether party opposing the motion has raised any triable issue barring summary adjudication; however, once trial has been had, availability of official immunity should be determined by trial record, not the pleadings nor the summary judgment record. [Ortiz v. Jordan, 131 S. Ct. 884 \(2011\)](#).

The burden of establishing qualified immunity falls to the official claiming it as a defense. [Burns v. PA Dept. of Corrections, 642 F.3d 163 \(3d Cir. 2011\)](#).

### [END OF SUPPLEMENT]

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[FN1] § 390.

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[FN2] [Shechter v. Comptroller of City of New York, 79 F.3d 265 \(2d Cir. 1996\)](#) (qualified immunity); [Lightfoot v. Floyd, 667 So. 2d 56, 107 Ed. Law Rep. 378 \(Ala. 1995\)](#) (qualified immunity); [Quintal v. City of Hallowell, 2008 ME 155, 956 A.2d 88 \(Me. 2008\)](#); [Aldridge v. De Los Santos, 878 S.W.2d 288, 92 Ed. Law Rep. 727 \(Tex. App. Corpus Christi 1994\)](#), writ dismissed w.o.j., (Oct. 6, 1994).

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[FN3] [Burgess v. Jaramillo, 914 S.W.2d 246 \(Tex. App. Fort Worth 1996\)](#).

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[FN4] [Jones-Clark v. Severe](#), 118 Or. App. 270, 846 P.2d 1197 (1993).

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[FN5] [Baldridge v. Cordes](#), 350 Ark. 114, 85 S.W.3d 511 (2002).

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[FN6] [Toto v. Ensuar](#), 196 N.J. 134, 952 A.2d 463 (2008) (good faith); [Aldridge v. De Los Santos](#), 878 S.W.2d 288, 92 Ed. Law Rep. 727 (Tex. App. Corpus Christi 1994), writ dismissed w.o.j., (Oct. 6, 1994).

- It is not enough that defendants were government officials to establish qualified immunity; they must further demonstrate that the specific acts at issue were performed within the scope of their official duties. [Shechter v. Comptroller of City of New York](#), 79 F.3d 265 (2d Cir. 1996).

- For a discussion of immunity of public officers and employees, generally, see [§§ 295 et seq.](#)

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[FN7] [Feagins v. Waddy](#), 978 So. 2d 712, 231 Ed. Law Rep. 986 (Ala. 2007).

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[FN8] [Forrester v. White](#), 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

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[FN9] [Autry v. Western Kentucky University](#), 219 S.W.3d 713, 219 Ed. Law Rep. 811 (Ky. 2007).

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[FN10] [Rich v. Dollar](#), 841 F.2d 1558 (11th Cir. 1988); [Liu v. New York City Police Dept.](#), 216 A.D.2d 67, 627 N.Y.S.2d 683 (1st Dep't 1995).

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[FN11] [Burns-Toole v. Byrne](#), 11 F.3d 1270 (5th Cir. 1994); [Pino v. Higgs](#), 75 F.3d 1461 (10th Cir. 1996) (to avoid summary judgment); [McDaniel v. Woodard](#), 886 F.2d 311 (11th Cir. 1989).

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[FN12] [Watson v. University of Utah Medical Center](#), 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996); [Dolihite v. Maughon By and Through Videon](#), 74 F.3d 1027 (11th Cir. 1996); [Rooks v. State Through Oklahoma Corp. Com'n](#), 1992 OK CIV APP 155, 842 P.2d 773 (Ct. App. Div. 3 1992) (based on presumption of qualified immunity).

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[FN13] [E-Z Mart Stores, Inc. v. Kirksey](#), 885 F.2d 476 (8th Cir. 1989).

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[FN14] [Ballantyne v. Champion Builders, Inc.](#), 144 S.W.3d 417 (Tex. 2004).

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[FN15] [Young v. Selsky](#), 41 F.3d 47, 41 Fed. R. Evid. Serv. 559 (2d Cir. 1994); [Minch v. D.C.](#), 952 A.2d 929 (D.C. 2008); [Smith v. Danielczyk](#), 400 Md. 98, 928 A.2d 795 (2007).

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[FN16] [Smith v. Danielczyk](#), 400 Md. 98, 928 A.2d 795 (2007).

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[FN17] [§ 327.](#)

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[\[FN18\] Feagins v. Waddy, 978 So. 2d 712, 231 Ed. Law Rep. 986 \(Ala. 2007\)](#) (defendants acted willfully, maliciously, fraudulently, in bad faith, or beyond their authority); [Chamberlain v. Mathis, 151 Ariz. 551, 729 P.2d 905 \(1986\)](#) (proof of objective malice); [Jones v. Kearns, 120 N.C. App. 301, 462 S.E.2d 245 \(1995\)](#); [Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 \(1973\)](#).

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[\[FN19\] McDonough v. City of Rosemount, 503 N.W.2d 493 \(Minn. Ct. App. 1993\)](#).

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[\[FN20\] Anderson v. Romero, 72 F.3d 518 \(7th Cir. 1995\)](#).

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**§ 393. Questions of fact or law**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

The question of qualified immunity is one of law for the court.<sup>[FN1]</sup> Claims of immunity turn on questions of law<sup>[FN2]</sup> or are purely questions of law,<sup>[FN3]</sup> at least on undisputed facts.<sup>[FN4]</sup> However, to the extent that qualified immunity depends on the resolution of disputed material facts, some of those disputes may be for the trier of fact to resolve.<sup>[FN5]</sup> Other issues, such as whether the defendant is a public official and, if so, whether the duty he or she was performing was discretionary or ministerial, will be for the court.<sup>[FN6]</sup> Furthermore, defining the scope of immunity is a legal question for the court.<sup>[FN7]</sup>

The question whether a defendant's actions amount to willful and wanton misconduct is normally one of fact to be resolved by the jury.<sup>[FN8]</sup>

After an special jury verdict on a qualified immunity defense that is arguably inconsistent with other findings, the plaintiff does not waive the issue by failing to seek judgment as a matter of law or a new trial, where enforcing the verdict finding qualified immunity could unjustly deprive the plaintiff of the right to recover for a violation of constitutional rights.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Siegert v. Gilley](#), 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); [Lightfoot v. Floyd](#), 667 So. 2d 56, 107 Ed. Law Rep. 378 (Ala. 1995); [Smith v. Brt](#), 363 Ark. 126, 211 S.W.3d 485 (2005) (with regard to the reasonable person standard); [Minch v. D.C.](#), 952 A.2d 929 (D.C. 2008); [Pratt v. Ottum](#), 2000 ME 203, 761 A.2d 313 (Me. 2000); [Artis v. Cyphers](#), 100 Md. App. 633, 642 A.2d 298 (1994), judgment aff'd, 336 Md. 561, 649 A.2d 838 (1994); [Stone v. Badgerow](#), 511 N.W.2d 747 (Minn. Ct. App. 1994); [Liu v. New York City Police Dept.](#), 216 A.D.2d 67, 627 N.Y.S.2d 683 (1st Dep't 1995); [Cook v. Cincinnati](#), 103 Ohio App. 3d 80, 658 N.E.2d 814 (1st Dist. Hamilton County 1995); [Barnhouse v. City of Edmond](#), 2003 OK 42, 73 P.3d 840 (Okla. 2003) (further stating that the decision should identify the law on which it based and the basis for the court's conclusion); [Yoak v. Marshall University Bd. of Governors](#), 223 W. Va. 55, 672 S.E.2d 191, 241 Ed. Law Rep. 451 (2008); [Barnhill v. Board of Regents of UW System](#), 166 Wis. 2d 395, 479 N.W.2d 917, 72 Ed. Law Rep. 623 (1992).

<sup>[FN2]</sup> [Rich v. Dollar](#), 841 F.2d 1558 (11th Cir. 1988).

<sup>[FN3]</sup> [City of Farmington v. Smith](#), 366 Ark. 473, 237 S.W.3d 1 (2006).

<sup>[FN4]</sup> [Row v. Holt](#), 864 N.E.2d 1011 (Ind. 2007).

<sup>[FN5]</sup> [Chamberlain v. Mathis](#), 151 Ariz. 551, 729 P.2d 905 (1986) (facts underlying immunity claim and whether that immunity was abused); [Artis v. Cyphers](#), 100 Md. App. 633, 642 A.2d 298 (1994), judgment aff'd, 336 Md. 561, 649 A.2d 838 (1994) (existence of gross negligence or malice); [McDonough v. City of Rosemount](#), 503 N.W.2d 493 (Minn. Ct. App. 1993) (whether act was malicious or willful).

<sup>[FN6]</sup> [Artis v. Cyphers](#), 100 Md. App. 633, 642 A.2d 298 (1994), judgment aff'd, 336 Md. 561, 649 A.2d 838 (1994).

<sup>[FN7]</sup> [Chamberlain v. Mathis](#), 151 Ariz. 551, 729 P.2d 905 (1986).

[\[FN8\] Urban v. Village of Lincolnshire, 272 Ill. App. 3d 1087, 209 Ill. Dec. 505, 651 N.E.2d 683 \(1st Dist. 1995\); Soucek v. Banham, 503 N.W.2d 153 \(Minn. Ct. App. 1993\).](#)

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[\[FN9\] Stephenson v. Doe, 332 F.3d 68, 56 Fed. R. Serv. 3d 619 \(2d Cir. 2003\).](#)

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## **§ 394. Determination on motion to dismiss or summary judgment**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

The presence or absence of qualified immunity is generally determined on either a motion to dismiss<sup>[FN1]</sup> or for summary judgment.<sup>[FN2]</sup> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.<sup>[FN3]</sup> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue concerning whether the defendant in fact committed those acts.<sup>[FN4]</sup> The qualified immunity doctrine requires summary judgment

even if the plaintiff's constitutional rights were violated, unless it is further demonstrated that the officer's conduct was unreasonable under the applicable standard.[\[FN5\]](#) The question whether a defendant's actions amount to willful and wanton misconduct may be determined by the trial court on a motion for summary judgment if all of the evidence, when viewed in the aspect most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary determination based on that evidence could ever stand.[\[FN6\]](#) Also, in a case involving a federal officer, a judge should determine, on a motion for summary judgment, whether the law was clearly established as of when the alleged acts occurred before allowing discovery;[\[FN7\]](#) although there is authority that summary judgment is not appropriate based on a state official's claim of immunity simply on a showing that the right alleged to have been violated was not clearly established, where the test under state law is focused solely on the objective legal reasonableness of the officer's conduct.[\[FN8\]](#)

To the extent that the issue of qualified immunity hinges on factual disputes that must be resolved by the trier of fact, the court may not resolve the legal issue on a preliminary motion.[\[FN9\]](#) If a complaint states a cause of action that penetrates the shield of qualified immunity, it should not be summarily dismissed; if discovery tends to support the allegations in the complaint or fails to disprove them, the matter must be resolved by the trier of fact.[\[FN10\]](#) Where summary judgment is inappropriate, and the case proceeds to trial, the defense of qualified immunity may be presented to the jury or may be decided by the court in a motion for judgment as a matter of law.[\[FN11\]](#)

The plaintiff may not respond to a motion for summary judgment simply with general attacks on the defendant's credibility, but must identify affirmative evidence from which a jury could find that the plaintiff has carried the burden of proving the defendant's lack of good faith.[\[FN12\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

After trial, if defendants continue to urge qualified immunity, decisive question, ordinarily, is whether evidence favoring the party seeking relief is legally sufficient to overcome defense. [Ortiz v. Jordan, 131 S. Ct. 884 \(2011\)](#).

In the context of qualified official immunity, summary judgments play an especially important role, as the defense renders one immune not just from liability, but also from suit itself. [Haney v. Monsky, 311 S.W.3d 235 \(Ky. 2010\)](#), as corrected, (May 7, 2010).

### [END OF SUPPLEMENT]

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[\[FN1\]](#) [Chamberlain v. Mathis, 151 Ariz. 551, 729 P.2d 905 \(1986\)](#) (if the facts establishing immunity are stated in the pleadings); [Wildoner v. Borough of Ramsey, 162 N.J. 375, 744 A.2d 1146 \(2000\)](#); [Liu v. New York City Police Dept., 216 A.D.2d 67, 627 N.Y.S.2d 683 \(1st Dep't 1995\)](#); [Sheridan v. City of Janesville, 164 Wis. 2d 420, 474 N.W.2d 799 \(Ct. App. 1991\)](#) (demurrer on the ground that the complaint fails to state a cause of action); [Abell v. Dewey, 870 P.2d 363 \(Wyo. 1994\)](#).

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[\[FN2\]](#) [Blissett v. Coughlin, 66 F.3d 531 \(2d Cir. 1995\)](#); [Lubcke v. Boise City/Ada County Housing Authority, Worrell, 124 Idaho 450, 860 P.2d 653 \(1993\)](#); [Carroll v. City of Portland, 1999 ME 131, 736 A.2d 279 \(Me. 1999\)](#); [Wildoner v. Borough of Ramsey, 162 N.J. 375, 744 A.2d 1146 \(2000\)](#); [Cook v. Cincinnati, 103 Ohio App. 3d 80, 658 N.E.2d 814 \(1st Dist. Hamilton County 1995\)](#); [Swedlund v. Foster, 2003 SD 8, 657 N.W.2d 39 \(S.D. 2003\)](#); [Yoak v. Marshall University Bd. of](#)



[Governors, 223 W. Va. 55, 672 S.E.2d 191, 241 Ed. Law Rep. 451 \(2008\); Abell v. Dewey, 870 P.2d 363 \(Wyo. 1994\).](#)

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[FN3] [Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\); Vander Zee v. Reno, 73 F.3d 1365 \(5th Cir. 1996\).](#)

- As to immunity issues being determined at an early stage of the case, see [§ 380](#).

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[FN4] [Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\).](#)

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[FN5] [Oldfield v. Benavidez, 116 N.M. 785, 867 P.2d 1167 \(1994\).](#)

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[FN6] [Urban v. Village of Lincolnshire, 272 Ill. App. 3d 1087, 209 Ill. Dec. 505, 651 N.E.2d 683 \(1st Dist. 1995\).](#)

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[FN7] [Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 \(1991\).](#)

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[FN8] [Cantu v. Rocha, 77 F.3d 795, 107 Ed. Law Rep. 459 \(5th Cir. 1996\).](#)

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[FN9] [Artis v. Cyphers, 100 Md. App. 633, 642 A.2d 298 \(1994\), judgment aff'd, 336 Md. 561, 649 A.2d 838 \(1994\).](#)

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[FN10] [Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 \(1987\).](#)

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[FN11] [Blissett v. Coughlin, 66 F.3d 531 \(2d Cir. 1995\).](#)

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[FN12] [Carey v. New England Organ Bank, 446 Mass. 270, 843 N.E.2d 1070 \(2006\).](#)

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**§ 395. Damages**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Money damages are available to victims of official acts that violate the due process clause of the Fifth Amendment.<sup>[FN1]</sup> There may be no limitation on damages in a suit against a public official acting in his or her individual capacity.<sup>[FN2]</sup> Statutes in some states specifically authorize the recovery of punitive damages in actions against public employees where immunity is not established.<sup>[FN3]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Section 1983 allows a plaintiff to seek money damages from government officials who have violated his constitutional rights. [42 U.S.C.A. § 1983](#). [Stoddard v. District of Columbia, 764 F. Supp. 2d 213 \(D.D.C. 2011\)](#).

**[END OF SUPPLEMENT]**

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<sup>[FN1]</sup> [Jayvee Brand, Inc. v. U.S., 721 F.2d 385 \(D.C. Cir. 1983\)](#).

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<sup>[FN2]</sup> [Andrade v. Perry, 863 A.2d 1272 \(R.I. 2004\)](#).

- As to suits against an officer individually, see [§ 386](#).

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<sup>[FN3]</sup> [Runyon v. Superior Court, 187 Cal. App. 3d 878, 232 Cal. Rptr. 101 \(4th Dist. 1986\)](#).

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## § 396. Indemnification

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[Payments of attorneys' services in defending action brought against officials individually as within power or obligation of public body, 47 A.L.R.5th 553](#)

As a general rule, a public agency may, with public funds, indemnify public officials, acting in good faith, for legal expenses incurred in suits brought against them for acts committed in the discharge of their duties.<sup>[FN1]</sup> The principal purpose of an indemnification statute for public employees is to assure the zealous execution of official duties by them,<sup>[FN2]</sup> and such a policy aims to lessen the burdens of personal liability that they may face as a result of their acts as public employees.<sup>[FN3]</sup>

To justify indemnification from public funds, the public officer must show that the act in question was done in good faith, which may require independent inquiries concerning good faith with respect to acting within the scope of employment and in committing particular acts.<sup>[FN4]</sup> "Good faith," in this context, means that the official did not actually know or should not reasonably have known that actions within the scope of his or her official responsibility violated another person's constitutional rights.<sup>[FN5]</sup>

A statute providing for the payment by a public entity of judgments or settlements against an employee or former employee applied only in situations in which the public entity provided a defense for the employee.[FN6] While the employee must cooperate with that defense,[FN7] the public employee need not first personally pay the judgment before being indemnified.[FN8]

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[FN1] Ellison v. Reid, 397 So. 2d 352 (Fla. Dist. Ct. App. 1st Dist. 1981) (attorney's fees incurred in successfully defending against charges of official misconduct).

- As to indemnity, generally, see Am. Jur. 2d, Indemnity §§ 1 et seq.

- As to the indemnification or defense of municipal officials, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 191.

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[FN2] In re Work Uniform Cases, 133 Cal. App. 4th 328, 34 Cal. Rptr. 3d 635, 202 Ed. Law Rep. 231 (1st Dist. 2005).

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[FN3] Lampkin v. Little, 286 F.3d 1206 (10th Cir. 2002) (applying Okla. law).

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[FN4] Lampkin v. Little, 286 F.3d 1206 (10th Cir. 2002) (applying Okla. law).

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[FN5] Martin v. Mullins, 170 W. Va. 358, 294 S.E.2d 161, 5 Ed. Law Rep. 1053 (1982).

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[FN6] Rivas v. City of Kerman, 10 Cal. App. 4th 1110, 13 Cal. Rptr. 2d 147 (5th Dist. 1992), opinion modified, (Nov. 23, 1992).

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[FN7] DeGrassi v. City of Glendora, 207 F.3d 636 (9th Cir. 2000) (holding that the California statute did not entitle the employee to retain independent counsel and be indemnified for associated costs, based on a unilateral assertion of conflict of interest involving the public employer).

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[FN8] Johnson v. County of Fresno, 111 Cal. App. 4th 1087, 4 Cal. Rptr. 3d 475 (5th Dist. 2003).

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**§ 397. Conclusiveness of judgment on successors in office**

**West's Key Number Digest**

West's Key Number Digest, Judgments 703

A successor in office is generally bound by an injunction or writ of mandamus against a predecessor.[\[FN1\]](#) Similarly, a successor is entitled to the protection of a former judgment rendered in the predecessor's favor.[\[FN2\]](#)

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[\[FN1\]](#) *Com. ex rel. Dummit v. Jefferson County*, 300 Ky. 514, 189 S.W.2d 604, 167 A.L.R. 512 (1945); *Phillips v. Interstate Securities Co. of Tex.*, 250 S.W.2d 444 (Tex. Civ. App. El Paso 1952).

- As to whether a peremptory writ is binding on successors, see [Am. Jur. 2d, Mandamus § 465](#).

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[\[FN2\]](#) *Com. ex rel. Dummit v. Jefferson County*, 300 Ky. 514, 189 S.W.2d 604, 167 A.L.R. 512 (1945).

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## § 398. Right to appeal from denial of immunity claim

### West's Key Number Digest

West's Key Number Digest, [Appeal and Error](#) 70(.5)

West's Key Number Digest, [Federal Courts](#) 574

The denial of a substantial claim of absolute immunity[FN1] or qualified immunity[FN2] is usually immediately appealable, whether the denial occurs on a defendant's motion for dismissal or summary judgment.[FN3] Where the factual issues with regard to qualified immunity[FN4] are resolved by the court preliminarily, and with them the legal issue of immunity,[FN5] immediate appellate review of a ruling rejecting the qualified immunity defense is permissible, the issues being legal.[FN6] Orders denying dispositive motions based on a public official's immunity are immediately appealable, because if the case were to be erroneously permitted to proceed to trial, the benefit of immunity would be effectively lost.[FN7] However, if the qualified immunity defense presents disputed factual issues or mixed questions of fact and law, review of the qualified immunity determination must await the trial court's resolution of the factual questions.[FN8] Thus, a portion of a summary judgment order entered in a case raising a question of qualified immunity, but which only determined a question of the sufficiency of the evidence, is not appealable.[FN9] Similarly, the denial of a motion for a directed verdict is not appealable, where the trial court did not decide as a matter of law that the officers were not entitled to immunity.[FN10]

There is other authority that a pretrial determination that sufficient facts were pleaded to avoid a public employee's immunity is subject to interlocutory appeal only if the immunity claim is jurisdictional, rather than an affirmative defense.[FN11]

A state appellate court may review a denial of qualified immunity, even where the plaintiff has also alleged causes of action to which qualified immunity would not apply.[FN12]

On an appeal of a final judgment following a jury trial, an appellate court may review the denial of a motion for summary judgment based on government immunity, where that defense was not raised in front of the jury, and therefore, any error was not merged into the subsequent trial.[FN13]

## CUMULATIVE SUPPLEMENT

### Cases:

Denial of a motion for summary judgment on the ground of qualified immunity may be deemed a final, appealable order because the qualified immunity doctrine exists partly to protect officials from having to stand trial, and a defendant wrongly forced to go to trial loses the benefit of the immunity even if exonerated after trial. [28 U.S.C.A. § 1291](#); [Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A. Bishop v. Hackel, 636 F.3d 757 \(6th Cir. 2011\)](#).

### [END OF SUPPLEMENT]

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[FN1] [Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\)](#).

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[FN2] [Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773, 34 Fed. R. Serv. 3d 1 \(1996\)](#); [Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\)](#).

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[FN3] [Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773, 34 Fed. R. Serv. 3d 1 \(1996\)](#).

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[FN4] [§ 393](#).

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[FN5] [§ 394](#).

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[FN6] [Artis v. Cyphers, 100 Md. App. 633, 642 A.2d 298 \(1994\)](#), judgment aff'd, [336 Md. 561, 649 A.2d 838 \(1994\)](#); [Oldfield v. Benavidez, 116 N.M. 785, 867 P.2d 1167 \(1994\)](#) (denial of summary judgment).

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[FN7] [Gutierrez v. Massachusetts Bay Transp. Authority, 437 Mass. 396, 772 N.E.2d 552 \(2002\)](#); [Farrell v. Transylvania County Bd. of Educ., 175 N.C. App. 689, 625 S.E.2d 128, 206 Ed. Law Rep. 724 \(2006\)](#).

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[FN8] [Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities, 64 F.3d 810 \(2d Cir. 1995\)](#).

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[FN9] [Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238, 32 Fed. R. Serv. 3d 1 \(1995\)](#).

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[FN10] [Murray v. Rosati, 929 So. 2d 1090 \(Fla. Dist. Ct. App. 4th Dist. 2006\)](#).

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[FN11] [Richardson ex rel. Richardson v. Starks, 36 P.3d 168, 160 Ed. Law Rep. 267 \(Colo. App 2001\)](#).

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[\[FN12\] Stone v. Badgerow, 511 N.W.2d 747 \(Minn. Ct. App. 1994\).](#)

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[\[FN13\] Valentino v. Hilquist, 337 Ill. App. 3d 461, 271 Ill. Dec. 697, 785 N.E.2d 891, 174 Ed. Law Rep. 1041 \(1st Dist. 2003\).](#)

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## **§ 399. Scope of review**

### **West's Key Number Digest**

West's Key Number Digest, [Appeal and Error](#) [870\(2\)](#)

West's Key Number Digest, [Federal Courts](#) [574](#)

An appellate court generally may review de novo a trial court's decision rejecting the application of a qualified immunity defense.[\[FN1\]](#) The appellate court only determines the question of law whether the legal right allegedly violated by the defendant was clearly established at the time of the challenged actions,[\[FN2\]](#) and does not reach the merits of the plaintiff's claims.[\[FN3\]](#)



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[\[FN1\] Furnace v. Oklahoma Corp. Com'n, 51 F.3d 932 \(10th Cir. 1995\); Dolihite v. Maughon By and Through Videon, 74 F.3d 1027 \(11th Cir. 1996\); Rooks v. State Through Oklahoma Corp. Com'n, 1992 OK CIV APP 155, 842 P.2d 773 \(Ct. App. Div. 3 1992\).](#)

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[\[FN2\] Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 \(1985\); Jarvis By and Through Jarvis v. Deyoe, 892 P.2d 398 \(Colo. App 1994\).](#)

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[\[FN3\] Colbert v. Hollis, 102 S.W.3d 445 \(Tex. App. Dallas 2003\).](#)

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### **§ 400. Indictment**

#### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 122

An indictment charging that a public official refrained from performing a duty imposed by law must allege the source of the duty imposed by law that the official failed to perform, in addition to the specification of facts alleged to constitute the failure.[\[FN1\]](#)

A criminal indictment for official misconduct must recite the duty that has been breached,[\[FN2\]](#) specifying mandatory legal duties specific to a particular public office, not general allegations of duty,[\[FN3\]](#) since in the absence of any express requirement, an officer may not be charged with refusing or failing to perform a lawfully required duty.[\[FN4\]](#) Such an indictment must, at a minimum, allege facts showing that the public official violated an identifiable statute, rule, regulation, or tenet of a professional code, and demonstrate how the public officer exceeded his or her lawful authority.[\[FN5\]](#) However, even if the language of a charge substantially tracked that of an ethics statute, which itself was not a criminal law, the indictment will be upheld if it did not show on its face that the ethics statute was necessarily the basis for the official misconduct charge.[\[FN6\]](#)

An indictment for official oppression is fatally defective if it fails to allege facts sufficient to show what official duty, if any, the officers were exercising or purporting to exercise on the occasion.[\[FN7\]](#) The harm resulting from an alleged abuse of official capacity must be described in an indictment for that offense.[\[FN8\]](#)

Where proof that personal financial gain was realized from public funds is not an element of the offense of using public office for personal gain, an allegation of obtaining public funds in an indictment for that offense is surplusage.[\[FN9\]](#)

A federal statute on conflict of interest[\[FN10\]](#) does not require pleading specific acts of negotiating or specific bilateral arrangements, because the terms "negotiating" and "arrangement" are common words of universal usage, and any person of ordinary intelligence has a fair notice of conduct proscribed by the statute.[\[FN11\]](#)

A state statute that provides a public official who is indicted for misconduct in office certain rights before a grand jury does not apply to an officer charged with a misdemeanor.[\[FN12\]](#)

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[\[FN1\]](#) [People v. Beruman, 638 P.2d 789 \(Colo. 1982\).](#)

- As to criminal liability of public officers, generally, see [§§ 362 et seq.](#)

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[\[FN2\]](#) [State v. Hess, 279 S.C. 14, 301 S.E.2d 547 \(1983\).](#)

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[\[FN3\]](#) [People v. Beruman, 638 P.2d 789 \(Colo. 1982\).](#)

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[\[FN4\]](#) [State v. Passman, 391 So. 2d 1140 \(La. 1980\).](#)

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[\[FN5\]](#) [People v. Grever, 222 Ill. 2d 321, 305 Ill. Dec. 573, 856 N.E.2d 378 \(2006\).](#)

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[\[FN6\]](#) [State v. Moine, 128 Or. App. 530, 877 P.2d 94 \(1994\).](#)

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[\[FN7\]](#) [State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 \(1967\).](#)

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[\[FN8\] State v. Campbell, 113 S.W.3d 9 \(Tex. App. Tyler 2000\)](#), petition for discretionary review refused, (July 26, 2000).

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[\[FN9\] Fitch v. State, 851 So. 2d 103 \(Ala. Crim. App. 2001\)](#).

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[\[FN10\] 18 U.S.C.A. § 208\(a\)](#), generally discussed in [§ 371](#).

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[\[FN11\] U.S. v. Conlon, 628 F.2d 150 \(D.C. Cir. 1980\)](#).

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[\[FN12\] Sanderson v. State, 217 Ga. App. 51, 456 S.E.2d 667 \(1995\)](#).

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## **§ 401. Effect of separation of powers**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [122](#)

The separation of powers doctrine bars criminal prosecution of a public official where it requires a judicial inquiry into legislators' subjective motivations.[\[FN1\]](#) However, the indictment and prosecution of legislators and staff for larceny relating to certifying payments to persons who had not done any work for the state does not violate separation of powers, as that allegation precludes the need to inquire into what were the proper duties of the legislative staff.[\[FN2\]](#)

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[\[FN1\] D'Amato v. Superior Court, 167 Cal. App. 4th 861, 84 Cal. Rptr. 3d 497 \(4th Dist. 2008\)](#), review denied, (Jan. 14, 2009).

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[\[FN2\] People v. Ohrenstein, 77 N.Y.2d 38, 563 N.Y.S.2d 744, 565 N.E.2d 493 \(1990\)](#).

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**§ 402. Removal by federal defendant**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [122](#)

Prosecutions against federal officers or employees may be removed to federal court under certain circumstances.[\[FN1\]](#) The removal statute does nothing more than grant District Court jurisdiction over cases in which a federal officer is a defendant and has federal official immunity or another federal defense.[\[FN2\]](#)

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[\[FN1\]](#) 28 U.S.C.A. § 1442(a)(1).

- The statute is discussed in the civil context at [§§ 420 et seq.](#)

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[\[FN2\]](#) *Mesa v. California*, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) (mail truck drivers may not remove state prosecutions for traffic violations where they did not raise a colorable claim of official immunity or any other federal defense).

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**§ 403. Indemnification**

**West's Key Number Digest**

Clear and direct statutory language is generally required to compel the government to defend or reimburse public officials in criminal proceedings,[\[FN1\]](#) and some courts will not exercise jurisdiction over that issue if there is not any constitutional or statutory provision directing or authorizing the payment of attorney's fees.[\[FN2\]](#) Other courts recognize a common-law doctrine that public officials should be reimbursed for fees incurred in successfully defending against unfounded allegations of official misconduct, including criminal charges, if charged while performing official duties and serving a public purpose.[\[FN3\]](#)

The rules governing whether a public official is entitled to indemnification for attorney's fees are the same in criminal cases as in civil cases, and the officer must show that the underlying criminal action must have arisen from the discharge of an official duty in which the government has an interest, the officer acted in good faith, and the agency seeking to indemnify the officer must have had either the express or implied power to do so.[\[FN4\]](#) A "not guilty" verdict in a criminal case is not conclusive evidence that the public employee has fulfilled all the listed criteria; rather, the verdict should be considered along with the other evidence.[\[FN5\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Pursuant to the reimbursement statute, which sets forth the conditions for reimbursement of public employees for attorney fees and costs incurred in the successful defense of criminal charges, the general rule is that a public employee is entitled to reimbursement when employment-related criminal charges result in a judgment of acquittal or dismissal of the information; the exceptions to this general rule arise where (1) the indictment or information is quashed or dismissed upon application or motion of the prosecuting attorney, or (2) the officer or employee is found guilty of substantially the same misconduct that formed the basis for the indictment or information. West's [U.C.A. § 52-6-201](#)(1). [Acor v. Salt Lake City School Dist., 2011 UT 8, 247 P.3d 404 \(Utah 2011\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Richter v. Shelby County, 745 N.W.2d 505 \(Iowa 2008\)](#).

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[\[FN2\] Mecham v. Arizona House of Representatives, 162 Ariz. 267, 782 P.2d 1160 \(1989\)](#).

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[\[FN3\] Leon County v. Stephen S. Dobson, III, P.A., 957 So. 2d 12 \(Fla. Dist. Ct. App. 1st Dist. 2007\)](#), review denied, [962 So. 2d 337 \(Fla. 2007\)](#).

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[\[FN4\] Dyke v. City of Parkersburg, 191 W. Va. 418, 446 S.E.2d 506 \(1994\)](#).

- Indemnification in civil cases is discussed in [§ 396](#).

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[\[FN5\] Dyke v. City of Parkersburg, 191 W. Va. 418, 446 S.E.2d 506 \(1994\)](#).

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## § 404. Evidence

### West's Key Number Digest

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In determining whether a former Federal Government employee violated a federal statute prohibiting certain acts with regard to Federal Government business,[\[FN1\]](#) a letter from the assistant attorney general in charge of the government agency division that advised the former employee that there would be no conflict is entitled to weight.[\[FN2\]](#)

A conviction of official conduct may not be sustained where the evidence was insufficient to show that the conduct at issue violated a statute or regulation and was in excess of lawful authority, and thus criminal.[\[FN3\]](#)

Evidence is sufficient to support a conviction for violating the oath of office, where there is testimony that that the defendant was required to take an oath, and the acts in question violated that oath.[\[FN4\]](#)

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[\[FN1\]](#) 28 U.S.C.A. § 207 discussed generally in [§ 264](#).

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[\[FN2\]](#) [C.A.C.I., Inc.-Federal v. U.S., 719 F.2d 1567, 71 A.L.R. Fed. 338 \(Fed. Cir. 1983\)](#).

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[\[FN3\]](#) [State v. Schmidt, 2005 MT 339N, 330 Mont. 401, 126 P.3d 507 \(2005\)](#).

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[\[FN4\]](#) [Bradley v. State, 292 Ga. App. 737, 665 S.E.2d 428 \(2008\)](#).

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## **§ 405. Instructions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [122](#)

The failure to specify in a requested instruction that violating a duty imposed by law or inherent in the office is an element of the crime of official misconduct renders the instruction inaccurate and incomplete.[\[FN1\]](#)

An instruction on the intent element of misconduct in public office—that a public officer's use of a state resource to promote a candidate in a political campaign or to raise money for a candidate provides a dishonest advantage to that candidate—which appears to raise a mandatory presumption, must be accompanied by a limiting instruction that the jury may, but is not required to, regard those basic facts as sufficient evidence of the presumed fact.[\[FN2\]](#)

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[\[FN1\] State v. Moine, 128 Or. App. 530, 877 P.2d 94 \(1994\).](#)

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[\[FN2\] State v. Schultz, 306 Wis. 2d 598, 2007 WI App 257, 743 N.W.2d 823 \(Ct. App. 2007\).](#)

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### **Primary Authority**

[2 U.S.C.A. § 118](#)

[5 U.S.C.A. App. 4 § 104](#)

[18 U.S.C.A. § 216](#)

[28 U.S.C.A. §§ 1391, 1442](#)

[31 U.S.C.A. § 3545](#)

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## § 406. Federal jurisdiction

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [119](#)

Actions against government officials may be based on the statute[[FN1](#)] granting federal question jurisdiction,[[FN2](#)] or on a statute[[FN3](#)] that grants federal district courts jurisdiction over mandamus actions to compel a federal officer or agency employee to perform a duty owed to the plaintiff.[[FN4](#)] However, a federal officer's state citizenship as a private individual is not a basis for invoking federal diversity jurisdiction on a cause of action arising out of the defendant's official conduct, where the defendant is being sued in his or her official capacity.[[FN5](#)]

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[[FN1](#)] [28 U.S.C.A. § 1331](#), discussed generally in [Am. Jur. 2d, Federal Courts §§ 884 et seq.](#)

[FN2] [Converse v. Udall, 399 F.2d 616, 5 A.L.R. Fed. 553 \(9th Cir. 1968\)](#); [Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225 \(10th Cir. 2005\)](#) (action against prison officials).

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[FN3] [28 U.S.C.A. § 1361](#) discussed generally in [Am. Jur. 2d, Mandamus § 10](#).

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[FN4] [Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225 \(10th Cir. 2005\)](#).

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[FN5] [Ajay Nutrition Foods, Inc. v. Food and Drug Administration, 378 F. Supp. 210 \(D.N.J. 1974\)](#), aff'd, [513 F.2d 625 \(3d Cir. 1975\)](#).

- As to suits in a defendant's official capacity, see [§ 386](#).

- As to diversity jurisdiction, see [Am. Jur. 2d, Federal Courts §§ 618 et seq.](#)

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**§ 407. Petition or action by Attorney General**

**West's Key Number Digest**

If the United States Attorney General has reason to believe that a person is engaging in conduct constituting a criminal offense under various statutes prohibiting certain conduct on the part of federal officers,[[FN1](#)] the Attorney General may petition an appropriate district court for an order prohibiting that person from engaging in that conduct.[[FN2](#)] The filing of such a petition does not preclude any other remedy that is available by law to the United States or any other person.[[FN3](#)] The Attorney General may also bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under those statutes.[[FN4](#)] The imposition of a civil penalty in such an action does not preclude any other criminal or civil statutory, common law, or administrative remedy available by law to the United States or any other person.[[FN5](#)] A federal statute also authorizes the Attorney General to bring a civil action to recover an amount due to the Federal Government on settlement of an account of a person accountable for public money when the person neglects or refuses to pay that amount to the Treasury.[[FN6](#)]

Under statutory provisions requiring certain financial disclosures by federal personnel,[[FN7](#)] the Attorney General may bring a civil action in any appropriate district court against any individual who knowingly and willfully falsifies or knowingly and willfully fails to file or report any information that the individual is required to report.[[FN8](#)]

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[[FN1](#)] [18 U.S.C.A. §§ 203 to 205, 207 to 209](#).

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[[FN2](#)] [18 U.S.C.A. § 216\(c\)](#).

- As to criminal liability of public officers or employees, generally, see [§§ 362 et seq.](#)

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[[FN3](#)] [18 U.S.C.A. § 216\(c\)](#).

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[[FN4](#)] [18 U.S.C.A. § 216\(b\)](#) (referring to offenses under [18 U.S.C.A. §§ 203 to 205, 207 to 209](#)).

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[[FN5](#)] [18 U.S.C.A. § 216\(b\)](#).

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[[FN6](#)] [31 U.S.C.A. § 3545](#).

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[[FN7](#)] [5 U.S.C.A. App. 4 §§ 101 et seq.](#), discussed generally in [§ 250](#).

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[[FN8](#)] [5 U.S.C.A. App. 4 § 104](#).

- As to civil liability for the failure to file such reports or filing of false reports, see [§ 332](#).

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## **§ 408. Implication of private right of action**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [103](#)

There is no private cause of action under the provisions of the federal antinepotism statute.<sup>[FN1]</sup> Furthermore, a criminal statute prohibiting certain conduct of federal employees in connection with Federal Government business<sup>[FN2]</sup> may not be construed to imply a private right of damages against either federal employees allegedly acting improperly or against private defendants accused of acting in combination with them.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Limongelli v. Postmaster General of U.S., 707 F.2d 368 \(9th Cir. 1983\)](#) (referring to provisions of [5 U.S.C.A. § 3110](#), discussed generally in [§ 94](#)).

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<sup>[FN2]</sup> [18 U.S.C.A. § 208](#), discussed generally in [§ 371](#).

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<sup>[FN3]</sup> [City and County of San Francisco v. U.S., 443 F. Supp. 1116 \(N.D. Cal. 1977\)](#), judgment aff'd, [615 F.2d 498 \(9th Cir. 1980\)](#).

- A contractor may not bring an action seeking to recover damages for the alleged breach of a contract terminated by the government for its convenience where the agreement was prohibited by [18 U.S.C.A. § 208. K & R Engineering Co., Inc. v. U. S., 222 Ct. Cl. 340, 616 F.2d 469 \(1980\).](#)

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## **§ 409. Legal representation of officers of House of Representatives**

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United States attorneys are required to represent officers of the House of Representatives sued for acts arising out of their official duties, upon request; the defense of those actions must be conducted under the supervision and direction of the Attorney General.[[FN1](#)]

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[\[FN1\] 2 U.S.C.A. § 118.](#)

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## **§ 410. Pleading and proof**

### **West's Key Number Digest**

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Since a plaintiff, to state a claim of constitutional violation, need not plead facts showing the absence of a defense of qualified immunity, even if good faith were the test for qualified immunity, a court errs in dismissing a claim against federal agents on the ground that the plaintiff had failed to plead that they acted in bad faith.[\[FN1\]](#)

In suits for civil damages based on official acts, federal officials who seek absolute exemption from personal liability for unconstitutional conduct bear the burden of showing that public policy requires an exemption of that scope.[\[FN2\]](#) Federal officials similarly have the burden of proving that they are entitled to absolute immunity from a state law tort claim.[\[FN3\]](#)

Under a statute authorizing civil actions against persons violating certain criminal provisions pertaining to public officers,[\[FN4\]](#) proof is by a preponderance of the evidence.[\[FN5\]](#)

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[\[FN1\] Castro v. U.S., 34 F.3d 106 \(2d Cir. 1994\).](#)

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[\[FN2\] Cleavinger v. Saxner, 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 \(1985\); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\).](#)

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[\[FN3\] Westfall v. Erwin, 484 U.S. 292, 108 S. Ct. 580, 98 LED 2d 619 \(1988\).](#)

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[\[FN4\] § 407.](#)

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[\[FN5\] 18 U.S.C.A. § 216\(b\).](#)

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**§ 411. Joinder of parties**

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[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

Additional persons may be joined as parties to any civil action under the public officer venue provision, in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.[\[FN1\]](#) A private party, such as a purchaser of government property, may be an indispensable party to an action against government officials, and while venue must be proper so far as the private party is concerned, the public officer venue provision facilitates the joinder of government officers and employees in the district where the private defendant may be sued.[\[FN2\]](#)

As a general rule, a superior federal official who is indispensable must be joined as a party in a suit against a federal officer,[\[FN3\]](#) but only if the judgment will require that the superior take action, either by exercising directly a power or having a subordinate exercise it for that defendant.[\[FN4\]](#)

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[\[FN1\]](#) [28 U.S.C.A. § 1391\(e\)](#).

- As to joinder in actions involving public officers, generally, see [§ 387](#).
- As to venue in actions against federal officers or employees, generally, see [§§ 412 et seq.](#)
- Generally, as to joinder of parties, see [Am. Jur. 2d, Parties §§ 124 et seq.](#)

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[\[FN2\]](#) [Lamont v. Haig, 590 F.2d 1124, 48 A.L.R. Fed. 418 \(D.C. Cir. 1978\); McKenna v. Udall, 418 F.2d 1171, 13 Fed. R. Serv. 2d 413 \(D.C. Cir. 1969\).](#)

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[\[FN3\]](#) [Coughlin v. Ryder, 341 F.2d 291 \(3d Cir. 1965\); Dredge Corp. v. Penny, 338 F.2d 456, 9 Fed. R. Serv. 2d 56C.11, Case 1, 1 A.L.R. Fed. 281 \(9th Cir. 1964\).](#)

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[\[FN4\]](#) [Williams v. Fanning, 332 U.S. 490, 68 S. Ct. 188, 92 L. Ed. 95 \(1947\).](#)

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[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

A civil action in which a defendant is an officer or employee of the United States or any of its agencies, acting in one's official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides; (2) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated; or (3) the plaintiff resides, if real property is not involved in the action.[FN1] The described statute is merely a venue provision and does not itself confer subject matter jurisdiction on a district court.[FN2] In essence, the provision was designed to confer venue over mandamus-like actions against federal officers.[FN3] The provision was intended by Congress to apply only to actions that are in essence against the United States, thereby providing for venue in cases where the plaintiff seeks to compel or enjoin governmental action by suing a federal officer in his or her official capacity.[FN4]

While the District of Columbia is a proper venue if an officer of the United States performs a significant amount of his or her official duties there,[FN5] venue of an action against federal officials may be proper in a federal district court other than that for the District of Columbia.[FN6]

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[\[FN1\] 28 U.S.C.A. § 1391\(e\).](#)

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[\[FN2\] Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570 \(1978\).](#)

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[\[FN3\] Stafford v. Briggs, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 \(1980\).](#)

- As to mandamus, generally, see [Am. Jur. 2d, Mandamus §§ 1 et seq.](#)

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[\[FN4\] Blackburn v. Goodwin, 608 F.2d 919 \(2d Cir. 1979\).](#)

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[\[FN5\] Dehaemers v. Wynne, 522 F. Supp. 2d 240 \(D.D.C. 2007\).](#)

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[\[FN6\] Finfer v. Caplin, 344 F.2d 38 \(2d Cir. 1965\); Shew v. Southland Corp. \(Cabell's Dairy Division\), 370 F.2d 376 \(5th Cir. 1966\); Smith v. U.S., 333 F.2d 70 \(10th Cir. 1964\).](#)

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## § 413. District in which defendant resides or can be found

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[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

The provision that venue lies in the district where a defendant resides<sup>[FN1]</sup> has been interpreted to mean the district where a defendant's office—the “official residence”—is maintained.<sup>[FN2]</sup> This venue choice is not exclusive,<sup>[FN3]</sup> and some officers and agencies may have more than one residence.<sup>[FN4]</sup> Only one defendant officer need reside in the district.<sup>[FN5]</sup> There is also authority for the view that venue is proper where the defendant can be “found.”<sup>[FN6]</sup>

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<sup>[FN1]</sup> [28 U.S.C.A. § 1391\(e\)](#), generally described in [§ 412](#).

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<sup>[FN2]</sup> [Clegg v. U.S. Treasury Dept.](#), 70 F.R.D. 486 (D. Mass. 1976); [Hartke v. Federal Aviation Administration](#), 369 F. Supp. 741 (E.D. N.Y. 1973).

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<sup>[FN3]</sup> [Kings County Economic Community Development Ass'n v. Hardin](#), 333 F. Supp. 1302 (N.D. Cal. 1971).

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<sup>[FN4]</sup> [Dehaemers v. Wynne](#), 522 F. Supp. 2d 240 (D.D.C. 2007).

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<sup>[FN5]</sup> [Briggs v. Goodwin](#), 569 F.2d 1 (D.C. Cir. 1977), judgment rev'd on other grounds, [444 U.S. 527](#), [100 S. Ct. 774](#), [63 L. Ed. 2d 1](#) (1980).

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<sup>[FN6]</sup> [Starnes v. McGuire](#), 512 F.2d 918 (D.C. Cir. 1974).

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#### **§ 414. District in which plaintiff resides**

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[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

The provision authorizing a suit in the district in which the plaintiff resides, if the action does not involve real property,[[FN1](#)] has been interpreted as meaning a plaintiff or one or more plaintiffs in a case in which there are multiple plaintiffs.[[FN2](#)] There is no requirement that all plaintiffs reside in the forum district, since requiring that every plaintiff in an action against the Federal Government or agent of it independently meet the standards of the venue statute would result in unnecessary multiplicity of litigation.[[FN3](#)]

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[\[FN1\] § 412.](#)

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[\[FN2\] Exxon Corp. v. F.T.C., 588 F.2d 895 \(3d Cir. 1978\); Dredge Corp. v. Penny, 338 F.2d 456, 9 Fed. R. Serv. 2d 56C.11, Case 1, 1 A.L.R. Fed. 281 \(9th Cir. 1964\).](#)

- As to joinder of parties under [28 U.S.C.A. § 1391](#)(e), see [§ 411](#).

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[\[FN3\] Exxon Corp. v. F.T.C., 588 F.2d 895 \(3d Cir. 1978\).](#)

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**§ 415. Officers and employees subject to provision; action against officer in individual capacity**

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[Applicability of 28 U.S.C.A. sec. 1391\(e\), providing for venue and process in civil suit against federal officer or employee for official conduct, to officer or employee no longer in government service or no longer serving government in capacity in which he acted, 48 A.L.R. Fed. 436](#)

[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

The phrase "an officer or an employee" of the United States or of any agency, to whom the public officer venue statute[[FN1](#)] applies, is descriptive of persons in the executive, as distinguished from the legislative, branch of the government, and the statute has been construed as not intended to apply to Congress or to its employees,[[FN2](#)] nor to judicial officers.[[FN3](#)]

The venue provision does not apply to an officer or employee who is no longer in government service or who is no longer serving the government in the capacity in which he or she performed the act on which the civil action is based[[FN4](#)] as of the date the suit was filed or the particular person was joined to the action as a defendant.[[FN5](#)]

The public officer venue provision does not apply in an action for damages against federal officers in their individual capacities, which are subject to the normal venue rule.[[FN6](#)]

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[[FN1](#)] [28 U.S.C.A. § 1391](#)(e), generally described in [§ 412](#).

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[[FN2](#)] [Liberation News Service v. Eastland](#), 426 F.2d 1379, 9 A.L.R. Fed. 710 (2d Cir. 1970); [Duplantier v. U.S.](#), 606 F.2d 654 (5th Cir. 1979).

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[[FN3](#)] [Duplantier v. U.S.](#), 606 F.2d 654 (5th Cir. 1979).

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[[FN4](#)] [Stafford v. Briggs](#), 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

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[[FN5](#)] [Sutain v. Shapiro and Lieberman](#), 678 F.2d 115 (9th Cir. 1982).

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[[FN6](#)] [Stafford v. Briggs](#), 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

- As to suits against officers in their official or individual capacity, see [§ 386](#).

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**§ 416. Change of venue**

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**A.L.R. Library**

[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

The federal public officer venue provision[[FN1](#)] and the federal provision for a change of venue for the convenience of parties and witnesses[[FN2](#)] have been applied together in granting a change of venue.[[FN3](#)]

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[[FN1](#)] [28 U.S.C.A. § 1391](#)(e), generally discussed in [§ 412](#).

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[[FN2](#)] [28 U.S.C.A. § 1404](#)(a), generally discussed in [Am. Jur. 2d, Federal Courts § 1243](#).

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[\[FN3\] Nestor v. Hershey, 425 F.2d 504 \(D.C. Cir. 1969\).](#)

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[Construction and application of 28 USC sec. 1391\(e\) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719](#)

The summons and complaint in a civil action under the public officer venue provision[\[FN1\]](#) must be served as provided by the Federal Rules of Civil Procedure,[\[FN2\]](#) which state that service on an officer of the United States must be effected by serving the United States in the manner prescribed and by also sending a copy of the summons and complaint by registered or certified mail to the officer.[\[FN3\]](#) However, delivery of the summons and complaint to the

officer or agency may be made by certified mail beyond the territorial limits of the district in which the action is brought.[\[FN4\]](#)

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[\[FN1\]](#) [28 U.S.C.A. § 1391](#)(e), generally discussed in [§ 412](#).

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[\[FN2\]](#) [28 U.S.C.A. § 1391](#)(e).

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[\[FN3\]](#) [Fed. R. Civ. P. 4](#)(i)(2)(A), generally discussed in [Am. Jur. 2d, Process §§ 262 et seq.](#)

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[\[FN4\]](#) [28 U.S.C.A. § 1391](#)(e).

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**§ 418. Waiver**

**West's Key Number Digest**

It has been held that the lack of proper service in a civil action against a federal officer may be waived by the United States Attorney by entering an appearance, for example, in response to an order to show cause.<sup>[FN1]</sup> However, the view has also been followed that an admission of service does not confer jurisdiction, if service was not properly made, and, therefore, an agency may not waive service on the Attorney General.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Smith v. McNamara, 395 F.2d 896, 4 A.L.R. Fed. 335 \(10th Cir. 1968\).](#)

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<sup>[FN2]</sup> [Benson v. City of Minneapolis, 286 F. Supp. 614 \(D. Minn. 1968\); Mission Beverage Co. v. Porter, 72 F. Supp. 568 \(N.D. N.Y. 1947\).](#)

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**§ 419. Personal jurisdiction**

Although the public officer venue provision<sup>[FN1]</sup> is, by its terms, a venue statute, service of process by certified mail on persons or entities named in the provision meets due process requirements for establishing personal jurisdiction.<sup>[FN2]</sup> Thus, when service is properly made in an action brought in an appropriate one of several districts that are alternatively outlined in that provision, the statute, if applicable to the particular action, supplies both venue and jurisdiction over the persons of those so served.<sup>[FN3]</sup> Any nonfederal defendants must be within the territorial jurisdiction of the court, but the venue provision can then be used to bring the federal defendants into that district.<sup>[FN4]</sup>

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<sup>[FN1]</sup> 28 U.S.C.A. § 1391(e), generally discussed in § 412.

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<sup>[FN2]</sup> *Duplantier v. U.S.*, 606 F.2d 654 (5th Cir. 1979).

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<sup>[FN3]</sup> *Liberation News Service v. Eastland*, 426 F.2d 1379, 9 A.L.R. Fed. 710 (2d Cir. 1970).

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<sup>[FN4]</sup> *Liberation News Service v. Eastland*, 426 F.2d 1379, 9 A.L.R. Fed. 710 (2d Cir. 1970); *Blum v. Morgan Guaranty Trust Co. of New York*, 539 F.2d 1388 (5th Cir. 1976).

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**Treatises and Practice Aids**

[Federal Procedure, L.Ed. §§ 40:793 et seq.](#) (Removal of state action to federal court by government officers)

A case commenced in a state court may be removed to the District Court of the United States for the district and division embracing the place in which it is pending by an officer of the United States or person acting under the officer, sued in an official or individual capacity for any act under color of that office or on account of any right, title, or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue;[FN1] an officer of the courts of the United States, for any act under color of office or in the performance of duties;[FN2] or an officer of either House of Congress, for any act in the discharge of official duty under an order of that House.[FN3] If removal can be justified under the removal statute, and the state court originally had jurisdiction, the federal court must also assume jurisdiction.[FN4] The right of removal is made absolute whenever a suit in state court is for any act under color of federal office, regardless of whether the suit could originally have been brought in federal court, and the statute must be liberally construed.[FN5] Thus, the statute allows suits against federal officers to be removed despite the nonfederal cast of the complaint and reflects a congressional policy that federal officers require the protection of a federal forum.[FN6]

Removal must be predicated on the averment of a federal defense, but that defense need be only colorable to assure the federal court that it has jurisdiction.[FN7] On the other hand, removal may not be used to collaterally attack an earlier judgment by raising federal defenses that should have been raised in an earlier state proceeding.[FN8]

Removal is neither a waiver of the right to question jurisdiction, nor is it tantamount to governmental consent to be sued,[FN9] and an appellate court has jurisdiction to determine if the district court had subject matter jurisdiction under that statute.[FN10]

Removal does not require that all of the defendants in a multiple defendant case join in the petition for removal.[FN11] Upon removal, a federal court has the power to hear claims that would not be independently removable, even after the basis for removal jurisdiction is dropped from the proceedings, as where the federal officers are dismissed as defendants.[FN12]

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[FN1] [28 U.S.C.A. § 1442\(a\)\(1\)](#).

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[FN2] [28 U.S.C.A. § 1442\(a\)\(3\)](#).

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[FN3] [28 U.S.C.A. § 1442\(a\)\(4\)](#).

- As to application of the statute in criminal cases, see [§ 402](#).

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[FN4] [Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174 \(8th Cir. 1978\)](#).

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[FN5] [Willingham v. Morgan, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 \(1969\)](#).

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[FN6] [Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S. Ct. 2145, 165 L. Ed. 2d 92 \(2006\)](#).

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[FN7] [Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S. Ct. 2145, 165 L. Ed. 2d 92 \(2006\)](#).

- The government contractor defense to state products liability claims, raised by chemical manufacturers that produced dioxin while manufacturing Agent Orange for the government, was a colorable federal defense, as required by [28 U.S.C.A. § 1442\(a\)](#). [Isaacson v. Dow Chemical Co., 517 F.3d 129 \(2d Cir. 2008\)](#).

- As to a corporation's power to remove under [28 U.S.C.A. § 1442\(a\)](#), see [§ 422](#).

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[FN8] [Ohio v. Doe, 433 F.3d 502 \(6th Cir. 2006\)](#).

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[FN9] [Stapleton v. Two Million Four Hundred Thirty-Eight Thousand, One Hundred and 10 Dollars \(\\$2,438,110\), 454 F.2d 1210 \(3d Cir. 1972\)](#).

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[FN10] [In re Methyl Tertiary Butyl Ether \("MTBE"\) Products Liability Litigation, 488 F.3d 112 \(2d Cir. 2007\)](#).

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[FN11] [Bradford v. Harding, 284 F.2d 307 \(2d Cir. 1960\)](#).

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[FN12] [Watkins v. Grover, 508 F.2d 920 \(9th Cir. 1974\)](#).

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## § 421. What constitutes acting under color of office

### West's Key Number Digest

West's Key Number Digest, [Removal of Cases](#) [21](#)

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[When is act "under color of such office" within meaning of 28 U.S.C.A. sec. 1442\(a\)\(1\), providing for removal from state court to federal court of civil action or criminal prosecution against officer of United States for any act under color of such office, 54 A.L.R. Fed. 442](#)

The phrase "color of office" in the statute that authorizes removal to federal district court of actions or prosecutions against certain federal officers where they have acted "under the color of such office," or "under color of office,"<sup>[FN1]</sup> requires that the federal officer's acts come within the scope of the necessary incidence of his or her duty as an officer of the United States.<sup>[FN2]</sup> A federal officer is acting under color of office so long as that person does not depart from the course of one's duty so that performance becomes a personal act.<sup>[FN3]</sup> Furthermore, a suit in a state court is for any act taken "under color" of federal office within the meaning of the removal statute whenever a federal defense can be alleged by a federal officer seeking removal.<sup>[FN4]</sup>

### CUMULATIVE SUPPLEMENT

#### Cases:

Removal of service member's state court products liability action against aircraft manufacturers was not warranted, under federal officer removal statute, even though manufacturers of aircraft containing asbestos acted under authority of Department of Navy and raised colorable government contract defense, since Navy did not prohibit manufacturers

from or otherwise direct manufacturers related to issuing warnings, so there was no causal connection between conduct performed under color of federal office and service member's claim that manufacturers failed to warn of dangers of exposure to asbestos that allegedly caused service member's malignant mesothelioma. [28 U.S.C.A. § 1442\(a\)\(1\)](#). [In re Asbestos Litigation](#), 661 F. Supp. 2d 451 (D. Del. 2009).

[END OF SUPPLEMENT]

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[FN1] [28 U.S.C.A. § 1442\(a\)](#).

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[FN2] [Willingham v. Morgan](#), 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969).

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[FN3] [Allman v. Hanley](#), 302 F.2d 559 (5th Cir. 1962).

- There could be no doubt that allegations that supervisors in the Internal Revenue Service had wrongfully commenced disciplinary proceedings against the plaintiff's husband with the intention of inflicting mental and emotional distress on him, alleged acts performed under color of federal office within the meaning of [28 U.S.C.A. § 1442](#). [Palermo v. Rorex](#), 806 F.2d 1266 (5th Cir. 1987).

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[FN4] [Kolibash v. Committee on Legal Ethics of West Virginia Bar](#), 872 F.2d 571 (4th Cir. 1989).

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**§ 422. Particular persons entitled to remove**

**West's Key Number Digest**

West's Key Number Digest, [Removal of Cases](#) [21](#)

**A.L.R. Library**

[Who Is "Person Acting Under" Officer of United States or Any Agency Thereof for Purposes of Availability of Right to Remove State Action to Federal Court Under 28 U.S.C.A. §1442\(a\)\(1\), 166 A.L.R. Fed. 297](#)

Such officers as federal judges are authorized to remove cases against them to federal court.<sup>[FN1]</sup> The fact that a government officer is a third-party defendant does not defeat the right of removal.<sup>[FN2]</sup>

The term "person" in the statute<sup>[FN3]</sup> includes corporate persons to which federal officers had delegated their functions.<sup>[FN4]</sup> However, a private firm's compliance with federal laws, rules, and regulations does not, by itself, fall within the scope of the phrase "acting under" a federal "official," as required to fall under the statute.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Tinkoff v. Holly, 209 F.2d 527 \(7th Cir. 1954\); O'Bryan v. Chandler, 496 F.2d 403 \(10th Cir. 1974\).](#)

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<sup>[FN2]</sup> [IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152 \(5th Cir. 1982\).](#)

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<sup>[FN3]</sup> [28 U.S.C.A. § 1442\(a\).](#)

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<sup>[FN4]</sup> [Isaacson v. Dow Chemical Co., 517 F.3d 129 \(2d Cir. 2008\)](#) (military contractor fulfilling duties that the Department of Defense otherwise would have to perform).

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<sup>[FN5]</sup> [Watson v. Philip Morris Companies, Inc., 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 \(2007\)](#) (holding that a cigarette manufacturer did not fall within the terms of [28 U.S.C.A. § 1442\(a\)](#), notwithstanding the Federal Trade Commission's detailed supervision of the cigarette testing process).

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### **§ 423. Removal by nonresident defendant**

#### **West's Key Number Digest**

West's Key Number Digest, [Removal of Cases](#) [21](#)

A personal action commenced in any state court by an alien against any citizen of a state who is, or at the time the alleged action accrued, was a civil officer of the United States and is a nonresident of that state, in which jurisdiction is obtained by the state court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.<sup>[FN1]</sup>

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<sup>[FN1]</sup> [28 U.S.C.A. § 1442\(b\)](#).

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## § 424. Pleadings

### West's Key Number Digest

West's Key Number Digest, [Removal of Cases](#) 21

The jurisdictional facts necessary for removal under the provision allowing removal to a federal court by a public officer<sup>[FN1]</sup> need not appear on the surface of the complaint in the state action,<sup>[FN2]</sup> and a state court complaint, a petition to remove, and any affidavit may be evaluated.<sup>[FN3]</sup> The federal official need not admit the allegations in the complaint.<sup>[FN4]</sup> All that is required is a showing of a "causal connection" between the charged conduct and the asserted official authority.<sup>[FN5]</sup>

**Observation:** If a plaintiff contests, by a motion to remand, a defendant's assertion that his or her actions were under color of office, the court must hold a hearing to determine the jurisdictional issues.<sup>[FN6]</sup>

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<sup>[FN1]</sup> 28 U.S.C.A. § 1442.

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<sup>[FN2]</sup> [Poss v. Lieberman, 299 F.2d 358 \(2d Cir. 1962\).](#)

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[\[FN3\] Poss v. Lieberman, 299 F.2d 358 \(2d Cir. 1962\); O'Bryan v. Chandler, 496 F.2d 403 \(10th Cir. 1974\).](#)

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[\[FN4\] Willingham v. Morgan, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 \(1969\).](#)

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[\[FN5\] Willingham v. Morgan, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 \(1969\).](#)

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[\[FN6\] O'Bryan v. Chandler, 496 F.2d 403 \(10th Cir. 1974\).](#)

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## **§ 425. Generally**

## **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 83

## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 25 to 33](#) (Pleadings for ouster of de jure officer)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 35 to 37](#) (Pleadings by ousted officials)

Remedies available to determine title to public office include an election contest<sup>[FN1]</sup> and quo warranto.<sup>[FN2]</sup> However, declaratory judgment and not quo warranto is the appropriate vehicle for an officer, whose impeachment conviction has been reversed, to use in asserting the right to his or her office.<sup>[FN3]</sup> The ultimate title to an office may also be considered in a removal proceeding.<sup>[FN4]</sup> Even though quo warranto is the usual remedy, and a court of equity does not try title to office, equitable relief may be granted if the remedy of quo warranto ceases to be available to the plaintiff.<sup>[FN5]</sup> A court may also entertain an action by elected officers to enjoin others from interfering with them in the performance of their duties.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Elections §§ 381 et seq.](#)

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<sup>[FN2]</sup> [Am. Jur. 2d, Quo Warranto §§ 24 et seq.](#)

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<sup>[FN3]</sup> [Parker v. Jefferson County Commission, 347 So. 2d 1321 \(Ala. 1977\).](#)

- As to impeachment, generally, see [§§ 213 et seq.](#)

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<sup>[FN4]</sup> [State ex rel. Porter v. Bivens, 151 W. Va. 665, 155 S.E.2d 827 \(1967\).](#)

- As to proceedings for removal, generally, see [§§ 168 et seq.](#)

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<sup>[FN5]</sup> [League of Women Voters of Lower Merion and Narberth v. Board of Com'rs of Lower Merion Tp., Montgomery County, 451 Pa. 26, 301 A.2d 797 \(1973\).](#)

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<sup>[FN6]</sup> [Daniels v. Adams, 314 Ky. 258, 234 S.W.2d 742 \(1950\).](#)

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## § 426. Collateral attack

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [80](#)

The general rule is that the title to an office may be litigated only in a proceeding brought directly for that purpose, and may not be determined by a collateral attack in another proceeding.<sup>[FN1]</sup> For this purpose, a collateral attack is where the official's title is questioned in a proceeding to which the officer is not a party or which was not instituted specifically to determine the validity of the officer's title, that title is questioned in a proceeding in which the officer is a party merely because the officer is acting in an official capacity, or it is necessary to show the officer's lack of title to lay a basis for some other relief.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Com. v. Vaidulas](#), 433 Mass. 247, 741 N.E.2d 450 (2001); [Sanitary and Imp. Dist. No. 57 of Douglas County v. City of Elkhorn](#), 248 Neb. 486, 536 N.W.2d 56 (1995) (disapproved of on other grounds by, [Adam v. City of Hastings](#), 267 Neb. 641, 676 N.W.2d 710 (2004)).

- Concerning collateral attack on the title of a de facto officer, see [§ 237](#).

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<sup>[FN2]</sup> [Aydelotte v. State](#), 85 Ark. App. 67, 146 S.W.3d 392 (2004).

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## § 427. Injunction

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 82

The courts will not ordinarily interfere by injunction to protect a right to hold a public office.[FN1] Equity generally will not interfere by injunction to determine questions concerning election or appointment to public office, or the title to such an office,[FN2] irrespective of whether the incumbent is an officer de jure or de facto.[FN3] However, a temporary injunction permitting the winner of an election recount to assume office may be granted where the winner is prima facie entitled to the office, and a quo warranto proceeding is not necessary, even if the defeated candidate has already taken the oath of office.[FN4] A permanent injunction may be granted where the plaintiff has unsuccessfully attempted to have the attorney general and the district attorney institute quo warranto proceedings to disqualify an officer.[FN5]

An injunction may properly be used to restrain rival claimants to an office from interfering with an incumbent in the possession of the office until such time as the claimants establish their rights at law[FN6] or to restrain interference with the discharge of the incumbent's official duties.[FN7] An equitable suit for such relief is not one to try title to the office,[FN8] and the defendant's title to office is not called into question in such a proceeding.[FN9]

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[\[FN1\] Jackson v. Cosby, 179 Md. 671, 22 A.2d 453 \(1941\).](#)

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[\[FN2\] Sheffield v. Heslep, 206 Ark. 605, 177 S.W.2d 412 \(1944\); Holley v. McDonald, 154 Conn. 228, 224 A.2d 727 \(1966\); Lockard v. Wiseman, 139 W. Va. 306, 80 S.E.2d 427 \(1954\).](#)

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[\[FN3\] Sheffield v. Heslep, 206 Ark. 605, 177 S.W.2d 412 \(1944\).](#)

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[\[FN4\] Perez v. McHazlett, 588 S.W.2d 807 \(Tex. Civ. App. San Antonio 1979\), dismissed, \(Jan. 23, 1980\).](#)

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[\[FN5\] League of Women Voters of Lower Merion and Narberth v. Board of Com'rs of Lower Merion Tp., Montgomery County, 451 Pa. 26, 301 A.2d 797 \(1973\).](#)

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[\[FN6\] Daniels v. Adams, 314 Ky. 258, 234 S.W.2d 742 \(1950\); Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 \(1935\); Emerson v. Hughes, 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 \(1952\); Lockard v. Wiseman, 139 W. Va. 306, 80 S.E.2d 427 \(1954\).](#)

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[\[FN7\] Watson v. Burnett, 216 Ind. 216, 23 N.E.2d 420 \(1939\).](#)

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[\[FN8\] Daniels v. Adams, 314 Ky. 258, 234 S.W.2d 742 \(1950\); Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 \(1935\).](#)

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[\[FN9\] McSween v. State Live Stock Sanitary Board of Florida, 97 Fla. 750, 122 So. 239, 65 A.L.R. 508 \(1929\).](#)

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**§ 428. Proceedings to try rights or title to de facto office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [83](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 17 to 23](#) (Pleadings for ouster of de facto officer)

A de facto officer is recognized as such until displaced by a regular direct proceeding for that purpose.<sup>[FN1]</sup> Quo warranto is a proper remedy to try the title to an office held by a de facto officer finally and conclusively.<sup>[FN2]</sup> The view has sometimes been followed that an action in quo warranto brought by the state or the person claiming the office is the exclusive means by which the title of a de facto officer may be challenged.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Barrett-Smith v. Barrett-Smith, 110 Wash. App. 87, 38 P.3d 1030 \(Div. 2 2002\).](#)

- Concerning collateral attack on the title of a de facto officer, see [§ 237](#).

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<sup>[FN2]</sup> [Tobler v. Beckett, 297 So. 2d 59 \(Fla. Dist. Ct. App. 2d Dist. 1974\); State v. Miller, 222 Kan. 405, 565 P.2d 228 \(1977\); Wayne County Republican Committee v. Wayne County Bd. of Com'rs, 70 Mich. App. 620, 247 N.W.2d 571 \(1976\); People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 \(1978\); State ex rel. Purola v. Cable, 48 Ohio St. 2d 239, 2 Ohio Op. 3d 410, 358 N.E.2d 537 \(1976\); State Dental Council and Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 \(1974\); Vick v. City of Waco, 614 S.W.2d 861 \(Tex. Civ. App. Waco 1981\), writ refused n.r.e., \(July 22, 1981\); State v. Franks, 7 Wash. App. 594, 501 P.2d 622 \(Div. 2 1972\).](#)

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<sup>[FN3]</sup> [State v. Miller, 222 Kan. 405, 565 P.2d 228 \(1977\); State Dental Council and Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 \(1974\); Vick v. City of Waco, 614 S.W.2d 861 \(Tex. Civ. App. Waco 1981\), writ refused n.r.e., \(July 22, 1981\); State v. Franks, 7 Wash. App. 594, 501 P.2d 622 \(Div. 2 1972\).](#)

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## § 429. Effect of estoppel

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [83](#)

The principles of estoppel<sup>[FN1]</sup> are sometimes invoked against a person's right to hold a public office or a person's status as a public officer, although the elements of estoppel must be established.<sup>[FN2]</sup>

A claimant's participation in an election and subsequent defeat is not a good reason to estop the person from contending that the election was invalid and that the claimant is entitled to the office as a holdover,<sup>[FN3]</sup> nor has the fact that a person has participated in the election to fill the office, or has done similar acts, resulted in an estoppel to claim an office.<sup>[FN4]</sup> However, where the petitioner—the winning candidate in an election—agreed to a recount, and the recount necessitated a run-off, which the candidate lost, the candidate was estopped from obtaining mandamus to compel certification of the validity of the original election.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Am. Jur. 2d, Estoppel and Waiver §§ 1 et seq.](#)

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<sup>[FN2]</sup> [Motes v. Davis, 188 Ga. 682, 4 S.E.2d 597, 125 A.L.R. 289 \(1939\).](#)

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[\[FN3\] Motes v. Davis, 188 Ga. 682, 4 S.E.2d 597, 125 A.L.R. 289 \(1939\).](#)

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[\[FN4\] Gibbs v. Bergh, 51 S.D. 432, 214 N.W. 838 \(1927\).](#)

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[\[FN5\] Robinson v. Plano Bd. of Ed., Plano Independent School Dist., 514 S.W.2d 135 \(Tex. Civ. App. Dallas 1974\).](#)

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## **§ 430. Proof and presumptions**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [83](#)

A presumption does not arise merely from a person's physical possession or attempt to exercise the authority of a public office.[\[FN1\]](#) The claimant to an office may have judgment only on the strength of one's own title and not upon any infirmity or weakness in the defendant's title.[\[FN2\]](#) The right to hold an elective public office is ordinarily shown by producing a certificate of election by the proper officer or by a canvass of votes showing that the officer has received the

necessary number of votes to have been elected.[\[FN3\]](#) Furthermore, the identity of an elected public official must be established with certainty and may not rest on speculation as to phonic similarity.[\[FN4\]](#)

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[\[FN1\] Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 \(1972\).](#)

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[\[FN2\] Jennings v. Woods, 194 Ariz. 314, 982 P.2d 274 \(1999\).](#)

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[\[FN3\] Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 \(1972\).](#)

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[\[FN4\] Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 \(1972\).](#)

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## Forms

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1. Recovery by Public Authority

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## § 431. Generally



## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [94](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 10](#) (Complaint to enjoin payment of increase in compensation and recover increased compensation paid)

Illegal payments made to public officers in violation of a statute may be recovered by the public body, even though the public received the benefit of the officers' work and the payments were made in good faith.[\[FN1\]](#) The statute of limitations begins to run in favor of an officer who has received overpayments from the time when the overpayments were made.[\[FN2\]](#)

The matter of setting and adjusting salary ranges is quasi-legislative, and a trial-type adjudicatory hearing is not necessary before salary reduction actions are taken.[\[FN3\]](#)

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[\[FN1\] Trimble County v. Moore, 312 S.W.2d 623 \(Ky. 1958\).](#)

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[\[FN2\] MacNeill v. McElroy, 193 Ga. 55, 17 S.E.2d 169, 137 A.L.R. 670 \(1941\).](#)

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[\[FN3\] Tirapelle v. Davis, 20 Cal. App. 4th 1317, 26 Cal. Rptr. 2d 666 \(3d Dist. 1993\).](#)

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### XII. Remedies and Procedure

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##### 1. Recovery by Public Authority

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#### § 432. Funds paid to de facto officer

##### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 94

In the absence of a statute, salary that has been paid to a de facto officer may not be recovered by the public authorities, at least where, acting in good faith, the person actually rendered the services for which he or she was paid.<sup>[FN1]</sup> Some cases, however, have permitted recovery by public authorities of the salary paid to a de facto officer, such as where the officer violated a constitutional prohibition on holding two public offices.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [U.S. v. Royer, 61 Ct. Cl. 1030, 268 U.S. 394, 45 S. Ct. 519, 69 L. Ed. 1011 \(1925\)](#); [McKenna v. Nichols, 295 Ky. 778, 175 S.W.2d 121 \(1943\)](#); [Miller v. County Com'rs of Carroll County, 226 Md. 105, 172 A.2d 867 \(1961\)](#); [Adams v. Goldner, 156 N.J. Super. 299, 383 A.2d 1149 \(App. Div. 1978\)](#), judgment aff'd, [79 N.J. 78, 397 A.2d 1088 \(1979\)](#); [State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 36 Ohio Op. 285, 76 N.E.2d 886 \(1947\)](#).

- As to the maintenance of an action by a de facto officer to recover compensation, see [§ 274](#).

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<sup>[FN2]</sup> [Thompson v. Clatskanie Peoples Public Utility Dist., 35 Or. App. 843, 583 P.2d 26 \(1978\)](#).

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**§ 433. Generally**

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[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 8](#) (Complaint by public officer to recover compensation)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 9](#) (complaint by public officer against predecessor to recover compensation paid predecessor while illegally holding over in office)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 47 to 52](#) (Pleadings by public employees to recover wages)

An action to recover compensation for holding a public office belongs to the person who has the true, rather than the colorable, title to the office, and title to the office is put in issue.[\[FN1\]](#) However, recovery is not allowed where the legislature has specifically barred compensation.[\[FN2\]](#) A taking does not occur where recovery is denied for compensation for work outside official duties, since, by voluntarily continuing to work under the statutorily determined terms of employment and by accepting the agreed compensation, the employee was fully reimbursed.[\[FN3\]](#) Also, a court does not have jurisdiction to determine what a reasonable salary would be, where the duty of setting the officer's salary is entrusted by law to another tribunal or body.[\[FN4\]](#)

An action for breach of contract, rather than a proceeding for the equivalent of a writ, may be the proper vehicle for a public employee who alleged that a government body breached the employment contract by failing to pay certain compensation.[\[FN5\]](#)

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[FN1] [Cottongim v. Stewart, 283 Ky. 615, 142 S.W.2d 171 \(1940\).](#)

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[FN2] [Malinou v. Powers, 114 R.I. 399, 333 A.2d 420 \(1975\).](#)

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[FN3] [Alfred v. County of Los Angeles, 101 Cal. App. 3d 260, 161 Cal. Rptr. 574 \(2d Dist. 1980\).](#)

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[FN4] [Ector County v. Stringer, 843 S.W.2d 477 \(Tex. 1992\).](#)

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[FN5] [Kerlikowske v. City of Buffalo, 305 A.D.2d 997, 758 N.Y.S.2d 739 \(4th Dep't 2003\).](#)

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**§ 434. Effect of agreement for compensation less than required by law**

**West's Key Number Digest**

A public officer is not estopped from claiming the salary as provided by law, by agreeing to accept, or by accepting, less than that,[[FN1](#)] such agreements being generally considered invalid as against public policy.[[FN2](#)] The rule has, in some jurisdictions, been construed as not extending to mere public employees,[[FN3](#)] although in others has been applied to public employees.[[FN4](#)] On the other hand, some courts have reached a contrary result on the theory that there has been a valid voluntary gift or donation of a public or charitable nature, precluding recovery by the officer or employee.[[FN5](#)]

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[[FN1](#)] [Jefferson County v. Case](#), 244 Ala. 56, 12 So. 2d 343 (1943); [Wright v. Village of Wilder](#), 63 Idaho 122, 117 P.2d 1002 (1941); [Jenkins v. City of Lindsborg](#), 152 Kan. 727, 107 P.2d 705 (1940); [Watson v. Lee County](#), 224 N.C. 508, 31 S.E.2d 535 (1944); [State ex rel. Ball v. City of Knoxville](#), 177 Tenn. 162, 147 S.W.2d 97, 145 A.L.R. 762 (1941); [Broom v. Tyler County Com'rs Court](#), 560 S.W.2d 435 (Tex. Civ. App. Beaumont 1977).

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[[FN2](#)] [§ 290](#).

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[[FN3](#)] [Jefferson County v. Case](#), 244 Ala. 56, 12 So. 2d 343 (1943).

- As to the distinction between public officers and employees, generally, see [§§ 9 et seq.](#)

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[[FN4](#)] [Malcolm v. Yakima County Consol. School Dist. No. 90](#), 23 Wash. 2d 80, 159 P.2d 394 (1945).

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[[FN5](#)] [Harley v. Passaic County](#), 121 N.J.L. 44, 1 A.2d 454 (N.J. Ct. Err. & App. 1938); [Schwarz v. City of Philadelphia](#), 337 Pa. 500, 12 A.2d 294 (1940).

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**§ 435. Recovery after removal, suspension, exclusion, or abandonment of office**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 94, 101

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 49](#) (Complaint, petition or declaration—By public employee—For salary withheld after illegal discharge)

A public officer who is properly suspended from office generally may not subsequently recover compensation for the period of the suspension.<sup>[FN1]</sup> There is some authority that recovery is not available if an officer is illegally suspended or discharged but is potentially available to an employee.<sup>[FN2]</sup>

While there is authority that an officeholder whose title to the office has been upheld is entitled to recover one's pay after his or her conviction was reversed,<sup>[FN3]</sup> it has elsewhere been held that a public officer whose felony conviction is reversed on appeal and who is voluntarily reinstated is not entitled to recover back pay for the period between the conviction and voluntary reinstatement.<sup>[FN4]</sup>

Since one who intentionally abandons office is generally not entitled to compensation for the remainder of the term,<sup>[FN5]</sup> such an officer is barred from recovering unearned compensation.<sup>[FN6]</sup> A person wrongfully deprived of one's office may not, for an unreasonable time, acquiesce in the removal and then sue to recover the salary,<sup>[FN7]</sup> since such a person abandoned title to the office and any right to recover its emoluments.<sup>[FN8]</sup>

An obligation to mitigate damages may apply to public officers<sup>[FN9]</sup> but has not been imposed by other courts,<sup>[FN10]</sup> even though a de facto official discharged the responsibilities of the office and received compensation.<sup>[FN11]</sup> In the context of a deferred assumption of office, the receipt of a salary from other activities when the officeholder was prevented from discharging the duties of the office does not occasion the harm sought to be avoided by holding incompatible offices, and hence, should not be offset.<sup>[FN12]</sup>

[\[FN1\] State ex rel. Ausburn v. City of Seattle, 190 Wash. 222, 67 P.2d 913, 111 A.L.R. 418 \(1937\).](#)

- Generally, as to termination or separation from employment as affecting a public officer's or employee's right to compensation, see [§§ 292 et seq.](#)

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[\[FN2\] Springfield Tp. v. Pedersen, 73 N.J. 1, 372 A.2d 286 \(1977\).](#)

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[\[FN3\] Parker v. Jefferson County Commission, 347 So. 2d 1321 \(Ala. 1977\).](#)

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[\[FN4\] Toro v. Malcolm, 44 N.Y.2d 146, 404 N.Y.S.2d 558, 375 N.E.2d 739 \(1978\).](#)

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[\[FN5\] § 293.](#)

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[\[FN6\] Jones v. Town of Wayland, 374 Mass. 249, 373 N.E.2d 199 \(1978\).](#)

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[\[FN7\] Nicholas v. U.S., 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 \(1921\); Sumeracki v. Wayne County, 354 Mich. 377, 92 N.W.2d 325 \(1958\).](#)

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[\[FN8\] Nicholas v. U.S., 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 \(1921\); Crowe v. Wayne County, 365 Mich. 656, 114 N.W.2d 240 \(1962\).](#)

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[\[FN9\] Wolf v. Missouri State Training School for Boys, 517 S.W.2d 138 \(Mo. 1974\).](#)

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[\[FN10\] Gentry v. Harrison, 194 Ark. 916, 110 S.W.2d 497 \(1937\); Buckalew v. City of Grangeville, 100 Idaho 460, 600 P.2d 136 \(1979\); Berardocco v. Casey, 45 Pa. Commw. 61, 404 A.2d 780 \(1979\).](#)

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[\[FN11\] Berardocco v. Casey, 45 Pa. Commw. 61, 404 A.2d 780 \(1979\).](#)

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[\[FN12\] Reed v. Sloan, 475 Pa. 570, 381 A.2d 421 \(1977\).](#)

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**§ 436. Effect of payment to de facto officer on recovery from governmental body**

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[Payment of salary to de facto officer or employee as defense to action or proceeding by de jure officer or employee for salary, 64 A.L.R.2d 1375](#)

The view has been followed in some instances that the payment of a salary to a de facto officer while the de jure officer was wrongfully excluded from office does not impair the right of the officer de jure to recover the salary or compensation from the public body.[\[FN1\]](#) On the other hand, some cases support the rule that payment to the de facto officer is a defense to a claim by the de jure officer, at least to the extent the payment was made in good faith.[\[FN2\]](#)

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[\[FN1\]](#) [Flack v. Graham, 453 So. 2d 819 \(Fla. 1984\); Board of County Com'rs of Oklahoma County v. Litton, 1957 OK 139, 315 P.2d 239, 64 A.L.R.2d 1365 \(Okla. 1957\); La Belle v. Hazard, 91 R.I. 42, 160 A.2d 723 \(1960\); State ex rel. Godby v. Hager, 154 W. Va. 606, 177 S.E.2d 556 \(1970\); Cowan v. State ex rel. Scherck, 57 Wyo. 309, 116 P.2d 854, 136 A.L.R. 1330 \(1941\).](#)

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[\[FN2\]](#) [Corbett v. City of Chicago, 391 Ill. 96, 62 N.E.2d 693 \(1945\); Hogan v. Garden County, 268 Neb. 631, 686 N.W.2d 356 \(2004\).](#)

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## **§ 437. Recovery from de facto officer or intruder or usurper**

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### **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 9](#) (Complaint by public officer against predecessor to recover compensation paid predecessor while illegally holding over in office)

A public officer generally has the right, on establishing title to the office, to recover from the de facto officer whatever compensation has been paid to that officer,[[FN1](#)] even though the de facto officer may have performed the duties of the office[[FN2](#)] pursuant to an erroneous judgment,[[FN3](#)] or may have held a certificate of election and entered into the office in good faith.[[FN4](#)] It is not a question of intention, but one of legal right to the compensation in dispute.[[FN5](#)] The rule holding a de facto officer liable to the de jure officer for compensation applies with even greater strictness to one who has usurped the office.[[FN6](#)] The claim is for money had and received.[[FN7](#)]

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[FN1] [Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 \(1944\)](#); [Dalton v. Fabius River Drainage Dist., 238 Mo. App. 655, 184 S.W.2d 776 \(1945\)](#); [Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\)](#).

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[FN2] [Dalton v. Fabius River Drainage Dist., 238 Mo. App. 655, 184 S.W.2d 776 \(1945\)](#).

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[FN3] [Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\)](#).

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[FN4] [Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946 \(1944\)](#); [Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\)](#).

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[FN5] [Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\)](#).

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[FN6] [Dalton v. Fabius River Drainage Dist., 238 Mo. App. 655, 184 S.W.2d 776 \(1945\)](#).

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[FN7] [Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269 \(1948\)](#).

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**§ 438. Recovery by de facto officers**

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The view has sometimes been followed that a de facto officer may not maintain an action to recover compensation attached to the office, even though the person has performed the duties of office.<sup>[FN1]</sup> The opposite result may be required by statute,<sup>[FN2]</sup> and other cases have taken the position that one who becomes a public officer de facto without bad faith, dishonesty, or fraud, and renders the services required of the office, may recover the compensation provided by law for those services during the period of their rendition.<sup>[FN3]</sup> Some of these cases specify that the absence of a de jure claimant is essential, however, and do not permit recovery for services after the de jure officer has been ascertained.<sup>[FN4]</sup>

The view has also been followed that one who has performed services as a de facto officer may recover their reasonable value on the theory that since the services were actually performed, and the public authority received the benefit, it should be required to pay what they were fairly worth.<sup>[FN5]</sup> The rule denying recovery on a quantum meruit basis has been said to be limited to situations where the officer involved was not acting in good faith, was wholly disqualified by law to perform public duties, or attempted to perform duties that did not have an original sanction in law, such as those of a nonexistent office or position or one assumed under a wholly illegal appointment or other purported authority.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [McKenna v. Nichols](#), 295 Ky. 778, 175 S.W.2d 121 (1943); [Norris v. Gilmer](#), 183 Va. 367, 32 S.E.2d 88 (1944).

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<sup>[FN2]</sup> [In re Police Sergeant \(PM3220S\)](#), Jersey City, 360 N.J. Super. 367, 823 A.2d 84 (App. Div. 2003).

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<sup>[FN3]</sup> [Naylor v. Carter](#), 1933 OK 659, 167 Okla. 125, 27 P.2d 843, 93 A.L.R. 254 (1933); [State ex rel. Reynolds v. Smith](#), 22 Wis. 2d 516, 126 N.W.2d 215 (1964).

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<sup>[FN4]</sup> [Naylor v. Carter](#), 1933 OK 659, 167 Okla. 125, 27 P.2d 843, 93 A.L.R. 254 (1933); [State ex rel. Reynolds v. Smith](#), 22 Wis. 2d 516, 126 N.W.2d 215 (1964).

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<sup>[FN5]</sup> [Cottongim v. Stewart](#), 283 Ky. 615, 142 S.W.2d 171 (1940); [City of Fort Worth v. Morrison](#), 164 S.W.2d 771 (Tex. Civ. App. Fort Worth 1942), writ refused.

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[\[FN6\] Gerson v. City of Philadelphia, 342 Pa. 552, 20 A.2d 283 \(1941\).](#)

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### § 439. Generally

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

The power to remove a public officer<sup>[FN1]</sup> may only be exercised in strict compliance with the procedural and substantive provisions of the applicable statute.<sup>[FN2]</sup> Removal proceedings are statutory, and a court is not at liberty to consider the wisdom of the prescribed procedures or apply procedures that conflict with the legislature's clear

intent.[\[FN3\]](#) Some statutes may distinguish between discipline and termination of probationary employees, for instance.[\[FN4\]](#)

In the absence of prejudice, a public employee challenging removal from employment may not assert the employing agency's procedural rules, unless that employee is a member of the class that the rule was intended to benefit; a showing of prejudice resulting from the failure to follow the rules will, however, ordinarily invalidate the removal action.[\[FN5\]](#)

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[\[FN1\] §§ 168 et seq.](#)

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[\[FN2\] Golaine v. Cardinale, 142 N.J. Super. 385, 361 A.2d 593 \(Law Div. 1976\)](#), judgment aff'd, [163 N.J. Super. 453, 395 A.2d 218 \(App. Div. 1978\)](#).

- As to the procedure for removal of civil service employees, see [Am. Jur. 2d, Civil Service §§ 73 et seq.](#)

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[\[FN3\] Madsen v. Brown, 701 P.2d 1086 \(Utah 1985\)](#).

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[\[FN4\] Smack v. Department Of Health And Mental Hygiene, 378 Md. 298, 835 A.2d 1175 \(2003\)](#).

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[\[FN5\] Parfitt v. Columbus Correctional Facility, 62 Ohio St. 2d 434, 16 Ohio Op. 3d 455, 406 N.E.2d 528 \(1980\)](#).

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**§ 440. Suspension**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

Absent a contrary constitutional provision, the suspension of a public officer is generally considered a subject within the control of the legislature, which may designate the mode of suspension.[FN1] When a statute provides for suspension by a particular method, the specified method is the only method available.[FN2] For instance, an executive exceeds one's authority by attempting to alter the penalty fixed by a hearing committee, by dismissing the employee instead of suspending the employee as recommended.[FN3]

The purpose of a suspension order is to protect the people, as well as to protect the suspended official by informing him or her of the grounds, and a governor may have the power to amend a suspension order so long as a suspended official is provided with adequate notice and time to prepare a defense.[FN4]

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[FN1] [Macaluso v. West, 40 Ill. App. 3d 392, 352 N.E.2d 382 \(5th Dist. 1976\).](#)

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[FN2] [Macaluso v. West, 40 Ill. App. 3d 392, 352 N.E.2d 382 \(5th Dist. 1976\).](#)

- As to notice and hearing with regard to the suspension of public officers or employees, see [§ 453](#).

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[FN3] [State Dept. of Environmental Management v. Dutra, 121 R.I. 614, 401 A.2d 1288 \(1979\).](#)

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[FN4] [Bass v. Askew, 342 So. 2d 145 \(Fla. Dist. Ct. App. 1st Dist. 1977\).](#)

- As to the employee's due process rights, see [§ 453](#).

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**§ 441. Due process rights**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#), [72.12](#), [72.16\(1\)](#)

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[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 57](#) (Petition to compel reinstatement of public employee discharged without notice and hearing)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 59](#) (Petition to compel reinstatement of public employee—absence of due process)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 63](#) (Allegation—Lack of notice and hearing prior to discharge of public employee)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 66](#) (Answer—Municipal employee removed for cause—Hearing conducted after notice)

The due process clause guarantees public employees certain procedural safeguards prior to the termination of their employment.<sup>[FN1]</sup> To be entitled to due process, a public employee must have a property interest in continued employment.<sup>[FN2]</sup> State law,<sup>[FN3]</sup> including local law establishing the existence and scope of the claimed property



interest,[\[FN4\]](#) rather than the United States Constitution,[\[FN5\]](#) provides the source of this property interest. A public employee has a constitutionally protected interest in continued employment if there is a reasonable expectation, arising out of a state statute, rules, or a contract, that he or she will continue to be employed.[\[FN6\]](#) For instance, a public employee who may be discharged only "for cause" has a property interest in continued employment.[\[FN7\]](#) A collective bargaining agreement also vests state employees with such a property interest.[\[FN8\]](#) Once the locality confers a property interest in employment, it may not take the position away without abiding by the dictates of procedural due process.[\[FN9\]](#) Conversely, a public employee who does not have a statutory or contractual entitlement to one's job does not have a property interest.[\[FN10\]](#)

In the public employment context, the required due process before termination typically includes some kind of hearing and pretermination opportunity to respond.[\[FN11\]](#) It does not necessarily mean a trial before a judicial tribunal;[\[FN12\]](#) for example, grievance procedures created by collective bargaining agreements may satisfy the requirements of due process.[\[FN13\]](#) A court's decision regarding what process is due requires balancing the government's interest in the expeditious removal of an employee against the employee's interest in continued employment.[\[FN14\]](#)

**Caution:** It may be necessary for the official to request a hearing before making a due process claim.[\[FN15\]](#) A public employee who has received notice of a hearing and has appeared with the benefit of counsel to present evidence in his defense has waived technical defects in the procedure and has been accorded due process.[\[FN16\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

The tenured public employee is entitled, for purposes of procedural due process, to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story; the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings, and, in general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action. [Biliski v. Red Clay Consol. School Dist. Bd. of Educ., 574 F.3d 214, 247 Ed. Law Rep. 624 \(3d Cir. 2009\).](#)

If deciding official received new and material information by means of ex parte communications, thereby violating public employee's due process rights, violation is not subject to harmless error test; instead, employee is automatically entitled to entirely new and constitutionally correct removal proceeding. [U.S.C.A. Const.Amend. 5. Ward v. U.S. Postal Service, 634 F.3d 1274 \(Fed. Cir. 2011\).](#)

Former governor and her chief of staff violated right to due process of former President and non-ex officio member of board of directors for Puerto Rico Corporation for Public Broadcasting (PRCPB) by dismissing him from board for "insubordination" without meaningful opportunity to challenge dismissal; Puerto Rico law guaranteed board members a fixed term and removal for "just cause." [U.S.C.A. Const.Amend. 5. Guzman-Vargas v. Calderon, 672 F. Supp. 2d 273 \(D.P.R. 2009\).](#)

Procedural due process claims with respect to termination of a public employee are divided into three stages: initially, in "pretermination process" stage, an employee receives notice that he will be terminated, and he is given an opportunity to respond; then, the employer actually fires the employee; and finally, in the third stage, an employee has an opportunity to receive some measure of post-termination process, usually a hearing with heightened procedural safeguards. [U.S.C.A. Const.Amend. 14. Scott v. County of Richardson, 280 Neb. 694, 789 N.W.2d 44 \(2010\).](#)

Employee was not denied due process during pre-termination, termination, or administrative appellate proceedings concerning termination of his employment by the Department of Health, where employee was given written pre-action

notification of the Department's intention to terminate his employment and was given an opportunity to respond, Department considered employee's response and notified him in writing of its decision to terminate his employment, and employee received a full post-termination administrative hearing. [U.S.C.A. Const.Amend. 14. Geffre v. North Dakota Dept. of Health, 2011 ND 45, 795 N.W.2d 681 \(N.D. 2011\).](#)

One form of property entitled to due process protection is a public employee's right to continued employment pursuant to a one-year contract, given which, he or she may be dismissed only for cause. [U.S.C.A. Const.Amend. 14. Bailey v. Blount County Bd. of Educ., 303 S.W.3d 216, 30 I.E.R. Cas. \(BNA\) 421 \(Tenn. 2010\).](#)

**[END OF SUPPLEMENT]**

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[\[FN1\] Hanton v. Gilbert, 36 F.3d 4, 94 Ed. Law Rep. 714 \(4th Cir. 1994\).](#)

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[\[FN2\] Kosik v. Cloud County Community College, 250 Kan. 507, 827 P.2d 59, 73 Ed. Law Rep. 824 \(1992\).](#)

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[\[FN3\] O'Neill v. City of Auburn, 23 F.3d 685 \(2d Cir. 1994\); Morris v. City of Danville, Va., 744 F.2d 1041 \(4th Cir. 1984\); Kosik v. Cloud County Community College, 250 Kan. 507, 827 P.2d 59, 73 Ed. Law Rep. 824 \(1992\).](#)

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[\[FN4\] Morris v. City of Danville, Va., 744 F.2d 1041 \(4th Cir. 1984\).](#)

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[\[FN5\] Kosik v. Cloud County Community College, 250 Kan. 507, 827 P.2d 59, 73 Ed. Law Rep. 824 \(1992\).](#)

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[\[FN6\] Perkins v. Board of Directors of School Administrative Dist. No. 13, 686 F.2d 49, 6 Ed. Law Rep. 303 \(1st Cir. 1982\).](#)

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[\[FN7\] Peterson v. Atlanta Housing Authority, 998 F.2d 904, 26 Fed. R. Serv. 3d 1040 \(11th Cir. 1993\) \(applying Ga. law\); Kosik v. Cloud County Community College, 250 Kan. 507, 827 P.2d 59, 73 Ed. Law Rep. 824 \(1992\).](#)

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[\[FN8\] In re Grievance of Towle, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

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[\[FN9\] Rivera-Flores v. Puerto Rico Telephone Co., 64 F.3d 742, 11 A.D.D. 576 \(1st Cir. 1995\).](#)

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[\[FN10\] Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 \(1981\).](#)

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[\[FN11\] Acevedo-Feliciano v. Ruiz-Hernandez, 447 F.3d 115, 64 Fed. R. Serv. 3d 1139 \(1st Cir. 2006\).](#)

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[\[FN12\] State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 \(1966\).](#)

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[\[FN13\] Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 \(7th Cir. 1995\).](#)

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[\[FN14\] Shoemaker v. County of Los Angeles, 37 Cal. App. 4th 618, 43 Cal. Rptr. 2d 774, 102 Ed. Law Rep. 259 \(2d Dist. 1995\).](#)

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[\[FN15\] Quinn v. Shirey, 293 F.3d 315, 2002 FED App. 0202P \(6th Cir. 2002\).](#)

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[\[FN16\] Schulze v. Board of Ed., School Dist. No. 258, Humboldt, 221 Kan. 351, 559 P.2d 367 \(1977\).](#)

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XII. Remedies and Procedure  
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2. Notice and Hearing Requirements  
a. Termination of Employment

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**§ 442. Statutory requirements**

**West's Key Number Digest**

Notice and hearing prior to the removal of officers may be expressly required by statutory or constitutional provisions.[\[FN1\]](#) In addition to satisfying the requirements of any such statute, a public entity must accord constitutional procedural due process before depriving a public officer of any significant property interest in his or her employment.[\[FN2\]](#) A state legislature may enact statutes that require hearings in situations where the Constitution does not and establish hearing procedures that go beyond constitutional minimums.[\[FN3\]](#) Where a statute creates the right to some kind of a hearing, the question is whether it creates the right to an informational or a trial-type hearing.[\[FN4\]](#)

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[\[FN1\]](#) [Rockefeller v. Hogue](#), 244 Ark. 1029, 429 S.W.2d 85 (1968); [Mays v. City of Los Angeles](#), 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008) (statute requiring notice and completing hearing within one year); [McCall v. Goldbaum](#), 863 S.W.2d 640 (Mo. Ct. App. E.D. 1993); [Zaffarano v. Ambler Borough Council](#), 420 Pa. 275, 216 A.2d 79 (1966).

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[\[FN2\]](#) [Mays v. City of Los Angeles](#), 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008).

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[\[FN3\]](#) [Crampton v. Harmon](#), 20 Or. App. 676, 533 P.2d 364 (1975).

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[\[FN4\]](#) [Farshy v. Campbell](#), 638 F.2d 829 (5th Cir. 1981) (statute did not require the full spectrum of judicial due process); [Crampton v. Harmon](#), 20 Or. App. 676, 533 P.2d 364 (1975).

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#### § 443. Before termination

#### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#), [72.12](#), [72.16\(1\)](#)

A public employee who may be discharged only for cause and who is entitled to a post-termination administrative hearing under state law generally must also be given a pretermination opportunity to respond to the charges as a matter of due process; the governmental interest in immediate termination does not outweigh the private interest in retaining employment and the risk of an erroneous termination.<sup>[FN1]</sup> Such a hearing may also be required by a state constitution as a matter of due process,<sup>[FN2]</sup> a state statute,<sup>[FN3]</sup> or a collective bargaining agreement.<sup>[FN4]</sup>

A tenured public employee is entitled to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to present his or her side of the story, prior to termination of employment.<sup>[FN5]</sup> However, requiring more may intrude on the government's interest in quickly removing an unsatisfactory employee,<sup>[FN6]</sup> and thus that interest and the risk of an erroneous termination must be weighed in determining what process is required.<sup>[FN7]</sup> Although the pretermination hearing need not be elaborate,<sup>[FN8]</sup> and an adversarial<sup>[FN9]</sup> or full evidentiary hearing<sup>[FN10]</sup> is not required, some kind of hearing must be afforded the employee prior to termination.<sup>[FN11]</sup> Due process requires only abbreviated pretermination processes where full postdeprivation processes are available<sup>[FN12]</sup> that prevent a violation of due process rights.<sup>[FN13]</sup> At this stage, the employee is not entitled to all of the evidence, but just notice of what evidence exists.<sup>[FN14]</sup>

An adequate opportunity was given where a supervisor read aloud a letter stating the ground for termination and gave it to the employee and asked the employee if she wished to respond,<sup>[FN15]</sup> while due process was denied where the employee was not given an opportunity to respond nor a post-termination hearing.<sup>[FN16]</sup>

A state employee's rights to due process were not violated where a superior reviewed his response to the charges against him, even though department policies required that the review be conducted by a separate board, since the employee's claim was akin to a requirement that there should be a full adversary proceeding, and only minimal due process is required.<sup>[FN17]</sup>

**Observation:** It has been noted that if it appears that a disciplinary action may have been based, even sub silentio, on alleged facts constituting employee misconduct, pretermination procedures must be followed, but those procedures may not be necessary if the employer can satisfactorily demonstrate that it would have terminated the employee for reasons other than misconduct, such as that the employee does not possess the skills, ability, or judgment necessary to fulfill the required duties.<sup>[FN18]</sup>

#### CUMULATIVE SUPPLEMENT

## Cases:

While necessary under the Due Process Clause, a public employee's pre-termination hearing need not be elaborate; it is sufficient that a tenured public employee receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present reasons, either in person or in writing, why the proposed action should not be taken. [U.S.C.A. Const.Amend. 14. \*Sherrod v. School Bd. of Palm Beach County\*, 703 F. Supp. 2d 1279 \(S.D. Fla. 2010\).](#)

A permanent, classified civil service employee's opportunity to present reasons why he should not be terminated at his pretermination hearing that is required by due process can be either in person or in writing. [U.S.C.A. Const.Amend. 14; LSA–Const. Art. 1, § 2. \*Lange v. Orleans Levee Dist.\*, 56 So. 3d 925 \(La. 2010\).](#)

To comport with due process, a pretermination hearing for a public employee need not be elaborate, and informal meetings with supervisors are sufficient. [U.S.C.A. Const.Amend. 14. \*Scott v. County of Richardson\*, 280 Neb. 694, 789 N.W.2d 44 \(2010\).](#)

## [END OF SUPPLEMENT]

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[\[FN1\] \*Cleveland Bd. of Educ. v. Loudermill\*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\).](#)

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[\[FN2\] \*Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen\*, 886 P.2d 700 \(Colo. 1994\).](#)

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[\[FN3\] \*Department of Public Safety & Correctional Services v. Donahue\*, 400 Md. 510, 929 A.2d 512 \(2007\)](#) (to consider mitigating circumstances before taking any disciplinary action).

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[\[FN4\] \*In re Grievance of Towle\*, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

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[\[FN5\] \*Cleveland Bd. of Educ. v. Loudermill\*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\).](#)

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[\[FN6\] \*Cleveland Bd. of Educ. v. Loudermill\*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\).](#)

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[\[FN7\] \*Danielson v. City of Seattle\*, 108 Wash. 2d 788, 742 P.2d 717 \(1987\).](#)

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[\[FN8\] \*Cleveland Bd. of Educ. v. Loudermill\*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\); \*In re Grievance of Towle\*, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

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[\[FN9\] \*Demming v. Housing and Redevelopment Authority, of Duluth, Minn.\*, 66 F.3d 950, 12 A.D.D. 61 \(8th Cir. 1995\).](#)

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[\[FN10\] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\); Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 \(2002\); In re Grievance of Towle, 164 Vt. 145, 665 A.2d 55 \(1995\).](#)

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[\[FN11\] Clements v. Airport Authority of Washoe County, 69 F.3d 321 \(9th Cir. 1995\); Kennedy v. Marion Correctional Inst., 69 Ohio St. 3d 20, 1994-Ohio-83, 630 N.E.2d 324 \(1994\).](#)

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[\[FN12\] Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 \(7th Cir. 1995\).](#)

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[\[FN13\] Cassel v. State, Dept. of Admin., 14 P.3d 278 \(Alaska 2000\); Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004 \(2002\)](#) (noting that the employee was given notice and an opportunity to respond in writing, and was ultimately vindicated); [Kennedy v. Marion Correctional Inst., 69 Ohio St. 3d 20, 1994-Ohio-83, 630 N.E.2d 324 \(1994\).](#)

- As to the effect of a post-termination hearing when the pretermination hearing is not provided or is inadequate, see [§ 447](#).

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[\[FN14\] Fridenstine v. Idaho Dept. of Admin., 133 Idaho 188, 983 P.2d 842 \(1999\).](#)

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[\[FN15\] Hanton v. Gilbert, 36 F.3d 4, 94 Ed. Law Rep. 714 \(4th Cir. 1994\).](#)

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[\[FN16\] Gaines v. New York State Div. for Youth, 213 A.D.2d 894, 623 N.Y.S.2d 936 \(3d Dep't 1995\).](#)

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[\[FN17\] Berdahl v. North Dakota State Personnel Bd., 447 N.W.2d 300 \(N.D. 1989\).](#)

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[\[FN18\] Public Service Com'n of Maryland v. Wilson, 389 Md. 27, 882 A.2d 849 \(2005\).](#)

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**§ 444. Before termination—Constitutionally protected interest as prerequisite**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#), [72.16\(1\)](#)

Before a government employee or officer is required to be provided with a hearing prior to termination, it must be shown that the employee or officer had a property or liberty interest in the employment, sufficient to warrant due process protections under the Fifth or Fourteenth Amendment,<sup>[FN1]</sup> and where an insufficient interest is shown, a hearing is not required by the due process clause of the Fifth<sup>[FN2]</sup> or Fourteenth<sup>[FN3]</sup> Amendment. When a government employee is found to have a property interest in the continuation of employment, the due process clause of the Fourteenth Amendment forbids terminating employment unless the employee is afforded a pretermination hearing.<sup>[FN4]</sup>

As in the case of due process rights in this context, generally,<sup>[FN5]</sup> state law is determinative in this regard.<sup>[FN6]</sup> The Fourteenth Amendment compels a pretermination hearing for state employees holding contractual rights to continuing state employment under formal tenure programs as well as for employees having a cognizable property interest in continued employment on the basis of de facto tenure programs fostered by a state on which the employee relied.<sup>[FN7]</sup> The protected property interests may also arise from express or implied contracts for continued employment.<sup>[FN8]</sup> An allegation that public employees were subject to a merit system of employment sufficiently claims that an employee was covered by a policy under which he or she could only be terminated for cause, as required to state a procedural due process violation where a hearing prior to termination was denied.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Bishop v. Wood](#), 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); [Tennessee v. Dunlap](#), 426 U.S. 312, 96 S. Ct. 2099, 48 L. Ed. 2d 660 (1976).

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<sup>[FN2]</sup> [Arnett v. Kennedy](#), 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974).

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[\[FN3\] Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 \(1976\); Tennessee v. Dunlap, 426 U.S. 312, 96 S. Ct. 2099, 48 L. Ed. 2d 660 \(1976\).](#)

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[\[FN4\] O'Neill v. City of Auburn, 23 F.3d 685 \(2d Cir. 1994\).](#)

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[\[FN5\] § 441.](#)

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[\[FN6\] Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 \(1976\).](#)

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[\[FN7\] Wilderman v. Nelson, 467 F.2d 1173 \(8th Cir. 1972\).](#)

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[\[FN8\] Danielson v. City of Seattle, 108 Wash. 2d 788, 742 P.2d 717 \(1987\).](#)

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[\[FN9\] Epps v. Watson, 492 F.3d 1240 \(11th Cir. 2007\).](#)

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## § 445. Sufficiency of notice

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 72.12

The requirement of a hearing prior to removal of a public employee[[FN1](#)] implies that the accused be given reasonable notice with a statement of charges sufficient to apprise him or her of the alleged causes for removal.[[FN2](#)] The purposes of this requirement are to put the public employee on notice of the charges[[FN3](#)] or the reason for discharge and to enable the employee to attempt to prepare a defense to that reason,[[FN4](#)] and to act as a check on mistaken accusations.[[FN5](#)] The notice must be sufficient to afford the employee a real and meaningful opportunity to respond to every charge or allegation brought as a basis for termination.[[FN6](#)] For instance, an accusation that evidence exists of more than one instance of use of state equipment for personal business does not provide an employee sufficient notice of the specific incidents.[[FN7](#)] However, the fact that one supposed reason for the termination was not stated in a letter does not violate due process, where a state board found that the employer proved all of the misconduct stated in the letter by a preponderance of the evidence.[[FN8](#)] Conversely, a notice listing numerous disciplinary violations provided sufficient notice of the charges, even though only a few of them were ultimately sustained.[[FN9](#)]

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[[FN1](#)] § 443.

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[[FN2](#)] [Rockefeller v. Hogue](#), 244 Ark. 1029, 429 S.W.2d 85 (1968).

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[[FN3](#)] [In re Grievance of Hurlburt](#), 175 Vt. 40, 2003 VT 2, 820 A.2d 186 (2003).

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[[FN4](#)] [McCall v. Goldbaum](#), 863 S.W.2d 640 (Mo. Ct. App. E.D. 1993).

- Notice to a police officer of misconduct charges, and that the police department was proposing to the Chief of Police an adjudication of the charges by an administrative tribunal, was sufficient to inform the officer that the department was pursuing a disciplinary action, within the meaning of a statute requiring such notice. [Mays v. City of Los Angeles](#), 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008).

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[[FN5](#)] [In re Grievance of Hurlburt](#), 175 Vt. 40, 2003 VT 2, 820 A.2d 186 (2003).

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[[FN6](#)] [Davis v. City of Cheyenne](#), 2004 WY 43, 88 P.3d 481 (Wyo. 2004).

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[\[FN7\] Skvorc v. State, Personnel Bd., 996 P.2d 1192 \(Alaska 2000\).](#)

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[\[FN8\] In re Grievance of Hurlburt, 175 Vt. 40, 2003 VT 2, 820 A.2d 186 \(2003\).](#)

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[\[FN9\] Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 \(2002\).](#)

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## **§ 446. Post-termination hearing**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.16\(1\)](#)

A post-termination hearing must provide the parties a more thorough opportunity to present their evidence and to challenge adverse evidence that was promised at a pretermination hearing.[\[FN1\]](#) Even so, there is not an absolute right

to face-to-face confrontation between a discharged employee and the principal witness against him or her at a post-termination arbitration hearing.<sup>[FN2]</sup> Substantial compliance with a public employee hearing statute may be sufficient.<sup>[FN3]</sup>

The due process clause requires that a post-termination hearing be provided at a meaningful time, and there is a point at which an unjustified delay in completing that proceeding becomes a constitutional violation.<sup>[FN4]</sup> While the record may need to be developed on why a hearing was not held until after a statutory deadline had expired,<sup>[FN5]</sup> a complaint by a discharged public employee alleging a violation of due process on the basis that the post-termination administrative proceedings took too long did not state a claim of a constitutional deprivation, where the employee did not indicate that the wait was unreasonably prolonged, other than the fact that it took nine months, or that an accusation of dishonesty lingered during post-termination administrative proceedings, where the employee failed to allege that the reasons for the dismissal were published.<sup>[FN6]</sup>

**Observation:** Grievance and arbitration procedures under a collective bargaining agreement may satisfy the requirements of postdeprivation due process,<sup>[FN7]</sup> and the same standard of due process applies to them.<sup>[FN8]</sup> The availability of a judicial remedy under state law may also satisfy the requirement for due process after termination.<sup>[FN9]</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

For procedural due process purposes, perfunctory pre-termination procedures with respect to public employees usually demand more exacting post-termination hearing. U.S.C.A. Const.Amend. 14. *Smith v. Michigan Dept. of Corrections*, 765 F. Supp. 2d 973 (E.D. Mich. 2011).

Post-termination procedure provided need only be reasonable and give public employee notice and opportunity to participate meaningfully in order to comply with due process. U.S.C.A. Const.Amend. 14. *Gunasekera v. Irwin*, 748 F. Supp. 2d 816 (S.D. Ohio 2010).

### [END OF SUPPLEMENT]

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<sup>[FN1]</sup> Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn., 68 Ohio St. 3d 175, 1994-Ohio-354, 624 N.E.2d 1043, 87 Ed. Law Rep. 599 (1994).

- Public employees discharged under a statute providing for discharge based on the duration of an employee's voluntary leave of absence were entitled to a full post-termination hearing. Hurwitz v. Perales, 81 N.Y.2d 182, 597 N.Y.S.2d 288, 613 N.E.2d 163 (1993).

- A terminated employee's due process rights were not violated in light of extensive pre and post-termination procedures, including an eight-day evidentiary hearing following termination. Fridenstine v. Idaho Dept. of Admin., 133 Idaho 188, 983 P.2d 842 (1999).

- A deputy constable had a procedural due process right to a hearing before the county civil service commission on his grievance regarding termination of employment. County of Dallas v. Walton, 216 S.W.3d 367 (Tex. 2007).

<sup>[FN2]</sup> Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn., 68 Ohio St. 3d 175, 1994-Ohio-354, 624 N.E.2d 1043, 87 Ed. Law Rep. 599 (1994).

[\[FN3\] Releford v. Pine Bluff School Dist. No. 3, 355 Ark. 503, 140 S.W.3d 483, 191 Ed. Law Rep. 494 \(2004\).](#)

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[\[FN4\] Hill v. City of Scranton, 411 F.3d 118 \(3d Cir. 2005\).](#)

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[\[FN5\] Prager v. State, Dept. of Revenue, 271 Kan. 1, 20 P.3d 39 \(2001\).](#)

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[\[FN6\] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 \(1985\).](#)

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[\[FN7\] Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 \(7th Cir. 1995\).](#)

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[\[FN8\] Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn., 68 Ohio St. 3d 175, 1994-Ohio-354, 624 N.E.2d 1043, 87 Ed. Law Rep. 599 \(1994\).](#)

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[\[FN9\] Locurto v. Giuliani, 447 F.3d 159 \(2d Cir. 2006\)](#) (referring to N.Y. law).

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**§ 447. Post-termination hearing—Effect on absence or inadequacy of pretermination hearing**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.16\(1\)](#)

There is authority for the view that, although the pretermination procedures afforded a dismissed public employee[[FN1](#)] are constitutionally inadequate, the error may be cured by a subsequent post-termination proceeding that meets due process standards.[[FN2](#)] For instance, even if a supervisor did not follow state procedures when the supervisor told an employee to clean out her desk and submit a letter of resignation, an adequate postdeprivation remedy affords all the process that is due.[[FN3](#)] However, an adequate postdeprivation remedy does not necessarily preclude the requirement of a predeprivation hearing where such a hearing was feasible and practical.[[FN4](#)] Although the nature of subsequent proceedings may lessen the amount of process that the state must provide pretermination, subsequent proceedings do not eliminate the essential requirement of a pretermination notice and opportunity to respond.[[FN5](#)]

**Observation:** The Supreme Court has said, beyond the exclusive context of public employees' or officers' terminations, that in situations where the state feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking, but that in instances where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, or where the state is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.[[FN6](#)]

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[[FN1](#)] [§ 443](#).

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[[FN2](#)] [Glenn v. Newman](#), 614 F.2d 467 (5th Cir. 1980).

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[[FN3](#)] [Walsh v. Cuyahoga County](#), 424 F.3d 510, 2005 FED App. 0799N (6th Cir. 2005).

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[[FN4](#)] [Chaney v. Suburban Bus Div. of Regional Transp. Authority](#), 52 F.3d 623 (7th Cir. 1995).

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[[FN5](#)] [Clements v. Airport Authority of Washoe County](#), 69 F.3d 321 (9th Cir. 1995).

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[[FN6](#)] [Zinermon v. Burch](#), 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), discussed in [Am. Jur. 2d, Constitutional Law § 957](#).

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## § 448. Officers and employees removable at will

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#), [72.14](#), [72.16\(2\)](#)

In the absence of any evidence to the contrary,[FN1] or statutory or contractual requirements,[FN2] a public officer or employee who holds the position at will does not have a constitutionally protected property interest entitled to due process protection.[FN3] This rule applies where termination need not be predicated on just cause,[FN4] a public officer holds office only at the pleasure of superiors,[FN5] or the officer is a holdover.[FN6] However, even though an employee at will is not protected by statutory tenure, a contract, or the like, impairment of the discharged employee's future employability by the operation of state law following dismissal implicates a protectable Fourteenth Amendment liberty interest, in which case a post-termination hearing is required.[FN7] The at-will public employee is entitled to a name-clearing hearing[FN8] when discharged for reasons of dishonesty, immorality, or illegal conduct.[FN9]

**Observation:** Although it may be within a particular government body's authority to determine that employees are to be hired at will, a state may not declare the nonexistence of a property interest after the fact for Fourteenth Amendment purposes, if, for example, an individual's entitlement to a particular governmental benefit has been established as a result of a longstanding pattern or practice. Thus, while the government body could in fact declare an

employment status to be "not property," it could not do so after the fact with regard to employees governed by a previous policy manual, without clear and unmistakable notice and an opportunity to be heard.[\[FN10\]](#)

## CUMULATIVE SUPPLEMENT

### Cases:

Employee of county solicitor general lacked protected due process property interest in her employment, and thus she could be terminated without cause; solicitor general had never made any application to county to bring employee under county civil service system, and county had not passed ordinance or resolution making employee a civil service employee. [U.S.C.A. Const.Amend. 14](#); West's [Ga.Const. Art. 9, § 1, Par. 4](#); West's [Ga.Code Ann. § 15-18-71, 36-1-21](#). [Thomas v. Lee, 286 Ga. 860, 691 S.E.2d 845 \(2010\)](#).

### [END OF SUPPLEMENT]

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[\[FN1\] Farthing v. City of Shawnee, Kan., 39 F.3d 1131 \(10th Cir. 1994\)](#).

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[\[FN2\] Widder v. Durango School Dist. No. 9-R, 85 P.3d 518, 185 Ed. Law Rep. 1012 \(Colo. 2004\)](#), as modified on denial of reh'g, (Mar. 15, 2004).

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[\[FN3\] Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 \(1976\)](#); [Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 \(1984\)](#); [Ruggieri v. City of Somerville, 10 Mass. App. Ct. 43, 405 N.E.2d 982 \(1980\)](#).

- As to the need for a property interest in this context, generally see [§ 441](#).

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[\[FN4\] Nicoletta v. North Jersey Dist. Water Supply Commission, 77 N.J. 145, 390 A.2d 90 \(1978\)](#).

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[\[FN5\] Wilderman v. Nelson, 467 F.2d 1173 \(8th Cir. 1972\)](#); [Abel v. Cory, 71 Cal. App. 3d 589, 139 Cal. Rptr. 555 \(3d Dist. 1977\)](#); [Ex parte Castle, 248 Miss. 159, 159 So. 2d 81 \(1963\)](#); [Jones v. Bayless, 1953 OK 92, 208 Okla. 270, 255 P.2d 506 \(1953\)](#).

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[\[FN6\] Ause v. Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526 \(4th Dep't 1977\)](#).

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[\[FN7\] Nicoletta v. North Jersey Dist. Water Supply Commission, 77 N.J. 145, 390 A.2d 90 \(1978\)](#).

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[\[FN8\] § 477](#).

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[\[FN9\] Borschel v. City of Perry, 512 N.W.2d 565 \(Iowa 1994\)](#).

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[\[FN10\] Peterson v. Atlanta Housing Authority, 998 F.2d 904, 26 Fed. R. Serv. 3d 1040 \(11th Cir. 1993\).](#)

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#### **§ 449. Probationary or temporary employees**

##### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.14](#), [72.16\(2\)](#)

A probationary employee is precluded from claiming a property interest in continued government employment sufficient to warrant Fourteenth Amendment protection.[\[FN1\]](#) Thus, a probationary public employee may be discharged without a hearing and without a statement of reasons,[\[FN2\]](#) in the absence of any demonstration that the employee was dismissed in bad faith or for an improper or impermissible reason.[\[FN3\]](#)

**Caution:** A former probationary officer's bald assertions of bad faith do not entitle him or her to an evidentiary hearing into the facts surrounding termination.[\[FN4\]](#)

Like in the at-will employee situation,[\[FN5\]](#) an exception for a deprivation of a liberty interest applies in the case of stigmatizing the employee's reputation or seriously impairing the opportunity to earn a living, and the probationary

employee must be afforded notice and opportunity for a hearing appropriate to the nature of the case before the termination becomes effective.<sup>[FN6]</sup> The employee's usual remedy in such instances is a name-clearing hearing.<sup>[FN7]</sup> Furthermore, a hearing may be required where an issue of substantial nature is raised that the termination of a probationary public employee was not due to the failure to perform satisfactory service during the probationary period and was due to causes unrelated to work performance; in such instances, the petitioner bears the burden of presenting competent proof that the dismissal was for an improper reason or in bad faith.<sup>[FN8]</sup>

A temporary public employee who was dismissed without a hearing was not deprived of a protected property interest notwithstanding the employer's alleged failure to keep a promise to appoint the employee permanently to that position, since such an employee did not have a legitimate claim of entitlement to a claimed property interest based on that kind of promise.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Clark v. Ohio Dept. of Transp.](#), 89 Ohio App. 3d 96, 623 N.E.2d 631 (12th Dist. Fayette County 1993).

- As to the need for a property interest in this context, generally see [§ 441](#).

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<sup>[FN2]</sup> [Phillips v. Civil Service Com.](#), 192 Cal. App. 3d 996, 237 Cal. Rptr. 751 (4th Dist. 1987); [State ex rel. Rose v. Ohio Dept. of Rehab. & Corr.](#), 91 Ohio St. 3d 453, 2001-Ohio-95, 746 N.E.2d 1103 (2001) (predisciplinary hearing or review by a state board not required).

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<sup>[FN3]</sup> [Swinton v. Safir](#), 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 (1999).

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<sup>[FN4]</sup> [O'Neal v. Schembri](#), 212 A.D.2d 369, 622 N.Y.S.2d 32 (1st Dep't 1995).

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<sup>[FN5]</sup> [§ 448](#).

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<sup>[FN6]</sup> [Phillips v. Civil Service Com.](#), 192 Cal. App. 3d 996, 237 Cal. Rptr. 751 (4th Dist. 1987).

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<sup>[FN7]</sup> [§ 476](#).

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<sup>[FN8]</sup> [Beacham v. Brown](#), 215 A.D.2d 334, 627 N.Y.S.2d 358 (1st Dep't 1995).

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<sup>[FN9]</sup> [Averitt v. Cloon](#), 796 F.2d 195 (6th Cir. 1986).

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#### **§ 450. Employees discharged as result of reorganization or cost-cutting measure**

#### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

Under what has been called the "reorganization exception" to the rule under which due process requires a right to a hearing prior to a public employee's termination, when an employee's dismissal is the result of a reorganization or cost-cutting measure, the public employee does not have a due process right to a hearing,[[FN1](#)] at least to the extent the employee was not discharged under a pretextual or sham reorganization, and the employer's actions were in compliance with applicable statutes and civil service ordinances.[[FN2](#)] Under this reorganization exception, an employee discharged because of a reorganization or due to cost-cutting measures does not have a due process right to a hearing, despite the presence of a terminable for just cause only rule.[[FN3](#)] In some instances, however, public hearings with regard to the reorganization of a public authority have not satisfied due process requirements, such as where it was suggested that the layoff provisions in the applicable employee manual would be followed.[[FN4](#)]

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[[FN1](#)] [Duffy v. Sarault, 892 F.2d 139 \(1st Cir. 1989\)](#); [Dane County v. McCartney, 166 Wis. 2d 956, 480 N.W.2d 830 \(Ct. App. 1992\)](#).

[\[FN2\] Dane County v. McCartney, 166 Wis. 2d 956, 480 N.W.2d 830 \(Ct. App. 1992\).](#)

- As to modification or abolition of public office or employment rights, generally, see [§§ 44 et seq.](#)

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[\[FN3\] Dane County v. McCartney, 166 Wis. 2d 956, 480 N.W.2d 830 \(Ct. App. 1992\).](#)

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[\[FN4\] Clements v. Airport Authority of Washoe County, 69 F.3d 321 \(9th Cir. 1995\).](#)

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## **§ 451. Removal of federal agency employees for national security reasons**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

Under the statute authorizing the suspension[\[FN1\]](#) and removal[\[FN2\]](#) of a federal agency employee for national security reasons, a suspended employee who has a permanent or indefinite appointment, has completed the

probationary or trial period, and is a citizen of the United States, is entitled, after suspension and before removal, to a written statement of the charges within 30 days after suspension, which may be amended within 30 days thereafter and which must be stated as specifically as security considerations permit; an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits; a hearing, at the request of the employee, by an agency authority properly constituted for this purpose; review of the case by the head of the agency or a designee, before a decision adverse to the employee is made final; and a written statement of the decision of the head of the agency.[FN3]

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[\[FN1\] § 220.](#)

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[\[FN2\] § 186.](#)

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[\[FN3\] 5 U.S.C.A. § 7532\(c\).](#)

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## § 452. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

A public employee who has a property interest in employment is entitled to some kind of hearing prior to the imposition of discipline, such as a demotion.<sup>[FN1]</sup> Transfers and reassignments<sup>[FN2]</sup> and loss of supervisory duties<sup>[FN3]</sup> generally do not implicate a property interest for this purpose.

To the extent that the nature of the sanction imposed depends on the resolution of disputed facts or conflicting inferences, the agency must make findings of fact resolving them, but if a discretionary sanction is lawful and authorized, the exercise of discretion need not be justified by findings.<sup>[FN4]</sup>

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<sup>[FN1]</sup> [Ciambriello v. County of Nassau, 292 F.3d 307 \(2d Cir. 2002\)](#) (interest recognized under a state statute providing that an employee may not be subjected to a disciplinary penalty except for incompetency or misconduct shown after a hearing on stated charges); [Kennedy v. Marion Correctional Inst., 69 Ohio St. 3d 20, 1994-Ohio-83, 630 N.E.2d 324 \(1994\)](#) (employee given due process).

- As to the need for a property interest in this context, generally see [§ 441](#).

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<sup>[FN2]</sup> [Leonard v. Suthard, 927 F.2d 168 \(4th Cir. 1991\)](#); [Maples v. Martin, 858 F.2d 1546, 49 Ed. Law Rep. 529 \(11th Cir. 1988\)](#); [Shoemaker v. County of Los Angeles, 37 Cal. App. 4th 618, 43 Cal. Rptr. 2d 774, 102 Ed. Law Rep. 259 \(2d Dist. 1995\)](#).

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<sup>[FN3]</sup> [Torres-Rosado v. Rotger-Sabat, 335 F.3d 1 \(1st Cir. 2003\)](#).

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<sup>[FN4]</sup> [Maryland Aviation Admin. v. Noland, 386 Md. 556, 873 A.2d 1145 \(2005\)](#).

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**§ 453. Suspension**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

An officer may demonstrate a property interest in continued employment sufficient to invoke minimum due process protection<sup>[FN1]</sup> under regulations specifically providing that a suspension may occur only "for cause."<sup>[FN2]</sup> However, there is not an absolute rule that a government employer may not suspend an employee without pay unless that suspension is preceded by some kind of presuspension hearing, where there is a significant state interest in taking immediate action.<sup>[FN3]</sup> For instance, an emergency may justify an administrator taking temporary action suspending a public employee without a hearing, even in cases where due process requires one before final action is taken.<sup>[FN4]</sup>

A factual inquiry may be required into whether a post-termination appeal provides due process with respect to a prior interim, uncompensated suspension.<sup>[FN5]</sup>

Under the federal statute providing that the head of a federal agency may suspend without pay an employee of the agency when the head considers that action necessary in the interests of national security,<sup>[FN6]</sup> to the extent that the agency head determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Furthermore, within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why the employee should be restored to duty.<sup>[FN7]</sup>

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<sup>[FN1]</sup> § 441.

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<sup>[FN2]</sup> [Glenn v. Newman, 614 F.2d 467 \(5th Cir. 1980\).](#)

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[\[FN3\] Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 \(1997\)](#) (holding that a police officer was not entitled to notice and a hearing prior to suspension without pay based on being arrested on drug-related charges, since the fact that the officer had been arrested and charged assured that the suspension was not baseless, the officer's lost income was relatively insubstantial, and the state had a significant interest in immediately suspending a employee who occupied a position of great public trust and had felony charges filed against him).

- Due process did not mandate giving a part-time driver for a public bus operator additional notice or a hearing before being suspended, where, although the driver's interest in avoiding a suspension was significant, he was on notice about why he was being suspended, and the employer's interest in both managerial efficiency and public safety clearly outweighed the driver's interest in a presuspension hearing. [Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 \(7th Cir. 1995\)](#).

- [\[FN4\] Carrion v. Yeshiva University, 535 F.2d 722 \(2d Cir. 1976\)](#).

- [\[FN5\] Burger v. Board of School Directors of McGuffey School Dist., 576 Pa. 574, 839 A.2d 1055, 184 Ed. Law Rep. 448 \(2003\)](#).

- [\[FN6\] § 220](#).

- [\[FN7\] 5 U.S.C.A. § 7532\(a\)](#).

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### 3. Administrative Proceedings

#### a. In General

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#### § 454. Nature of proceeding

##### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#), [72.16\(1\)](#), [72.62](#), [72.64](#), [72.65](#)

The removal of a public officer from office generally involves an administrative<sup>[FN1]</sup> or quasi-judicial<sup>[FN2]</sup> function, and a board charged with removal authority is a mere administrative body.<sup>[FN3]</sup> Since an officer or body entrusted with the power of removal<sup>[FN4]</sup> necessarily acts in a quasi-judicial capacity, the procedure involved must therefore be of a quasi-judicial character.<sup>[FN5]</sup>

Quasi-judicial proceedings to remove an officer for cause must insure a fair trial, but strict compliance with legal procedure is not required.<sup>[FN6]</sup> A board conducting a removal proceeding is not bound by the technical rules of a regular court,<sup>[FN7]</sup> including the rules of evidence, and may consider evidence that would normally be incompetent in a judicial proceeding, so long as the evidence is reliable and probative.<sup>[FN8]</sup> A commission's refusal to permit an expert witness—who had extensive experience as a personnel manager—to express an opinion concerning the propriety of the discharge was within the commission's discretion.<sup>[FN9]</sup> Also, amendment of the accusation may be allowed as in other administrative proceedings, in the absence of prejudice.<sup>[FN10]</sup>

Any constitutional limitation on the power of removal should be strictly followed,<sup>[FN11]</sup> as, for example, constitutional requirements of notice and hearing.<sup>[FN12]</sup> However, it has been held that an administrative proceeding for the removal of a public officer is not rendered invalid by the failure of the administrative body to produce all of the witnesses at its command, where those witnesses were just as available, through subpoena, to the respondent officer.<sup>[FN13]</sup> A state employee, who appeared both informally and then with representation of counsel, had an opportunity, comporting with due process, to respond to the charges against him before the state made the decision to terminate his employment for misconduct, even if the state only produced those documents that would be used against him, absent any indication that the employee ever requested any specific information that might have assisted in a defense or made any showing that further discovery would have assisted him in any way.<sup>[FN14]</sup>

Personnel rules, accepted as a condition of public employment, sometimes provide that an administrative hearing authority will have original jurisdiction in all hearings that involve the dismissal or the reduction in force of a permanent employee.<sup>[FN15]</sup>

State law may establish time limits for conducting an investigation and initiating disciplinary action.<sup>[FN16]</sup> The Sixth Amendment right to counsel is not violated by questioning a public employee during an internal investigation, where the employee had not been charged with any crime at the time of the investigation, and Fifth Amendment rights are not violated where the employee was not threatened with job loss or other disciplinary action if he or she chose to remain silent during the investigation.<sup>[FN17]</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

A pre-termination hearing for a permanent, classified civil service employee, though obligatory, need not be elaborate or evidentiary in order to satisfy due process. [U.S.C.A. Const.Amend. 14](#); [LSA–Const. Art. 1, § 2](#). [Lange v. Orleans Levee Dist.](#), 56 So. 3d 925 (La. 2010).

**[END OF SUPPLEMENT]**

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[FN1] [Appeal of Fredericks](#), 285 Mich. 262, 280 N.W. 464, 125 A.L.R. 259 (1938); [City of Meridian v. Davidson](#), 211 Miss. 683, 53 So. 2d 48 (1951) (executive or administrative); [Fuller v. Mitchell](#), 269 S.W.2d 517 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.

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[FN2] [De Groot v. Sheffield](#), 95 So. 2d 912 (Fla. 1957); [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942); [Handlon v. Town of Belleville](#), 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

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[FN3] [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942).

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[FN4] [§ 169](#).

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[FN5] [Rockefeller v. Hogue](#), 244 Ark. 1029, 429 S.W.2d 85 (1968); [McAlpine v. Garfield Water Commission](#), 135 N.J.L. 497, 52 A.2d 759, 171 A.L.R. 172 (N.J. Ct. Err. & App. 1947); [Emerson v. Hughes](#), 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 (1952).

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[FN6] [McAlpine v. Garfield Water Commission](#), 135 N.J.L. 497, 52 A.2d 759, 171 A.L.R. 172 (N.J. Ct. Err. & App. 1947); [Emerson v. Hughes](#), 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 (1952).

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[FN7] [State ex rel. Rockwell v. State Bd. of Educ.](#), 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 (1942); [Emerson v. Hughes](#), 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 (1952).

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[FN8] [Tomlin v. Personnel Appeal Bd.](#), 177 Conn. 344, 416 A.2d 1205 (1979); [Fraternal Order of Police Montgomery County Lodge 35, Inc. v. Manger](#), 175 Md. App. 476, 929 A.2d 958 (2007) (rule that bars evidence of other crimes or wrongs in criminal trials was not applicable).

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[FN9] [Peery v. Department of Agriculture](#), 402 N.W.2d 695 (S.D. 1987).

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[FN10] [Skvorc v. State, Personnel Bd.](#), 996 P.2d 1192 (Alaska 2000).

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[FN11] [State ex rel. Hardie v. Coleman](#), 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 (1934).

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[\[FN12\] §§ 441 et seq.](#)

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[\[FN13\] State ex rel. Rockwell v. State Bd. of Educ., 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 \(1942\).](#)

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[\[FN14\] Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 \(2002\).](#)

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[\[FN15\] Glover v. State, 860 P.2d 1169 \(Wyo. 1993\).](#)

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[\[FN16\] Western Correctional Inst. v. Geiger, 371 Md. 125, 807 A.2d 32 \(2002\)](#) (rescission of discipline is the appropriate sanction for noncompliance with the time limit).

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[\[FN17\] Carson v. South Carolina Dept. of Natural Resources, 371 S.C. 114, 638 S.E.2d 45 \(2002\).](#)

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**§ 455. Compliance with regulatory provisions, rules, or directives**

## West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.10](#)

While a board conducting a removal proceeding is not bound by the technical rules of a regular court,[[FN1](#)] it is nevertheless bound to strict observance of all statutory requirements[[FN2](#)] and to observe the fundamentals of a fair and impartial trial.[[FN3](#)] Furthermore, it has been said that procedural regulations validly adopted by a government agency relating to employment or discharge of its employees are binding on it, even where the employee, in the absence of such standards, could have been summarily discharged at any time without procedural safeguards.[[FN4](#)] On the other hand, a failure to follow procedures in a department memorandum does not render a layoff invalid, where the memorandum is advisory in nature and does not confer procedural rights on public employees.[[FN5](#)]

Resolutions for the removal of a public officer adopted by a board or commission are not valid, where it appears that one or more of the members of the board or commission present and voting when the resolution was adopted were not present during the course of the entire hearing on which the resolution was predicated.[[FN6](#)]

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[[FN1](#)] [§ 454.](#)

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[[FN2](#)] [State ex rel. Rockwell v. State Bd. of Educ., 213 Minn. 184, 6 N.W.2d 251, 143 A.L.R. 503 \(1942\).](#)

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[[FN3](#)] [McAlpine v. Garfield Water Commission, 135 N.J.L. 497, 52 A.2d 759, 171 A.L.R. 172 \(N.J. Ct. Err. & App. 1947\).](#)

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[[FN4](#)] [Mazaleski v. Treusdell, 562 F.2d 701 \(D.C. Cir. 1977\).](#)

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[[FN5](#)] [State ex rel. Potten v. Kuth, 61 Ohio St. 2d 321, 15 Ohio Op. 3d 391, 401 N.E.2d 929 \(1980\).](#)

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[[FN6](#)] [McAlpine v. Garfield Water Commission, 135 N.J.L. 497, 52 A.2d 759, 171 A.L.R. 172 \(N.J. Ct. Err. & App. 1947\).](#)

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## § 456. Administrative review

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 72.20 to 72.30

Personnel rules, accepted by public employees as a condition of employment, sometimes provide that an employee may petition for administrative review within a specified number of days after receiving a notice of dismissal, and if an employee does not petition for review within the prescribed time, there is no other or further right to appeal, and the dismissal will stand.<sup>[FN1]</sup> Statutes sometimes provide that public employees who are dismissed, demoted, or suspended may, within a specified period after that action, appeal to the state personnel board.<sup>[FN2]</sup>

Some statutes limit the jurisdiction of a review commission to disciplinary (rather than administrative) actions involving transfers or the like,<sup>[FN3]</sup> while others confer jurisdiction to hear appeals in matters related to reduction in force.<sup>[FN4]</sup>

A state statute that specifies the time a state personnel board has to render a decision following a hearing or investigation of a state employee's appeal may be considered directory, although the employee may seek a judicial remedy if the time limit has passed.<sup>[FN5]</sup> The default provisions of other public employee grievance statutes may provide that the grievant prevails by default if employer-designated grievance evaluators fail to make timely decisions,<sup>[FN6]</sup> while under another system, the employee has the obligation to proceed to another step in the appeal if a timely decision is not reached at an earlier stage.<sup>[FN7]</sup>

Under some circumstances, such as where public employees were discouraged from filing grievances, their failure to exhaust administrative remedies does not deprive a state appeals board of jurisdiction.<sup>[FN8]</sup> However, an employee may be required to exhaust administrative remedies by challenging a decision to classify his or her job as nonexempt, or otherwise lose the right to appeal his or her later termination from that at-will position.<sup>[FN9]</sup>

[FN1] [Glover v. State, 860 P.2d 1169 \(Wyo. 1993\)](#).

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[FN2] [Martin v. Corrections Cabinet of Com., 822 S.W.2d 858 \(Ky. 1991\)](#) (applied to any state employee, including an unclassified employee or employee other than subject to the merit system); [Jones v. Western Missouri Mental Health Center, 878 S.W.2d 84 \(Mo. Ct. App. W.D. 1994\)](#) (statute applied to "regular employee" and the court determined when a probationary employee would so qualify); [Appeal of Pritchard, 137 N.H. 291, 627 A.2d 102 \(1993\)](#) (time limit ran from actual layoff, not from notice of proposed layoff); [Cibas v. New Mexico Energy, Minerals and Natural Resources Dept., 120 N.M. 127, 898 P.2d 1265 \(Ct. App. 1995\)](#).

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[FN3] [Sanchez v. Idaho Dept. of Correction, 134 Idaho 523, 5 P.3d 984 \(2000\)](#).

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[FN4] [North Dakota Dept. of Human Services v. Ryan, 2003 ND 196, 672 N.W.2d 649 \(N.D. 2003\)](#) (with regard to a right to be offered reemployment under certain conditions).

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[FN5] [California Correctional Peace Officers Assn. v. State Personnel Bd., 10 Cal. 4th 1133, 43 Cal. Rptr. 2d 693, 899 P.2d 79 \(1995\)](#).

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[FN6] [Smith v. West Virginia Division of Rehabilitative Services and Division of Personnel, 208 W. Va. 284, 540 S.E.2d 152 \(2000\)](#).

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[FN7] [In re Murdock \(New Hampshire Personnel Appeals Bd.\), 156 N.H. 732, 943 A.2d 757 \(2008\)](#).

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[FN8] [Mississippi Employment Sec. Com'n v. Culbertson, 832 So. 2d 519 \(Miss. 2002\)](#).

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[FN9] [Hough v. Iowa Dept. of Personnel, 666 N.W.2d 168 \(Iowa 2003\)](#).

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**§ 457. Scope of proceeding**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.31](#), [72.33](#)

The scope of administrative review of disciplinary proceedings is generally defined by statute<sup>[FN1]</sup> and may be limited to ensuring that managerial discretion has been legitimately invoked and properly exercised.<sup>[FN2]</sup> An administrative law judge may have the authority to determine whether an employee's dismissal was justified under the appropriate statute.<sup>[FN3]</sup> A board might not have the power to look beyond the reasons given by the employer in the disciplinary letter for the action taken.<sup>[FN4]</sup> A hearing officer reviewing the termination of a probationary state employee is not required to substitute one's own evaluation of the employee's performance in light of objective standards, instead of relying on the supervisor's evaluation, so long as that evaluation was made in good faith and with reference to objective performance standards.<sup>[FN5]</sup> Having found that a violation occurred, there might not be the authority to overrule an agency's determination to dismiss the employee,<sup>[FN6]</sup> while, elsewhere, a board may revoke or modify a disciplinary action if it was, in the board's sole discretion, too severe for the conduct proved,<sup>[FN7]</sup> or impose a lesser disciplinary sanction than termination.<sup>[FN8]</sup>

Rules generally applicable to administrative determinations control whether the person or body reviewing the agency's decision may do so de novo<sup>[FN9]</sup> or is limited to the same scope of review as a court,<sup>[FN10]</sup> supplement the record made before the administrative law judge,<sup>[FN11]</sup> substitute its conclusion for that of an ALJ,<sup>[FN12]</sup> or give deference to the ALJ's credibility determinations.<sup>[FN13]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

On appeal of a decision of Department of Health and Human Services (DHSS) terminating an employee, the Merit Employee Relations Board (MERB) had statutory authority to modify the DHSS decision and reinstate employee without back pay, and was not limited to merely accepting or rejecting the discipline imposed by DHSS, after MERB determined that the DHSS decision was based on a misapplication of merit rules governing state employees. [29 West's Del.C. §§ 5931\(a\)](#), [5949\(b\)](#). [Avallone v. State/Dept. of Health and Social Services \(DHSS\)](#), 14 A.3d 566 (Del. 2011).

**[END OF SUPPLEMENT]**

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[\[FN1\] Lawley v. Department of Higher Educ., 36 P.3d 1239, 160 Ed. Law Rep. 607 \(Colo. 2001\).](#)

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[\[FN2\] Department of Public Works v. Colbert, 874 A.2d 353 \(D.C. 2005\).](#)

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[\[FN3\] North Dakota Dept. of Transp. v. Central Personnel Div., 1999 ND 198, 600 N.W.2d 861 \(N.D. 1999\).](#)

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[\[FN4\] In re Grievance of Hurlburt, 175 Vt. 40, 2003 VT 2, 820 A.2d 186 \(2003\).](#)

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[\[FN5\] Cassel v. State, Dept. of Admin., 14 P.3d 278 \(Alaska 2000\).](#)

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[\[FN6\] North Dakota Dept. of Transp. v. Central Personnel Div., 1999 ND 198, 600 N.W.2d 861 \(N.D. 1999\)](#) (theft).

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[\[FN7\] Pima County v. Pima County Law Enforcement Merit System Council, 211 Ariz. 224, 119 P.3d 1027 \(2005\).](#)

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[\[FN8\] In re Grievance of Brown, 177 Vt. 365, 2004 VT 109, 865 A.2d 402 \(2004\).](#)

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[\[FN9\] Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 \(2002\); Harris v. Mississippi Dept. of Corrections, 831 So. 2d 1105 \(Miss. 2002\)](#) (de novo hearing cured any prior deficiency in procedure).

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[\[FN10\] Department of Public Works v. Colbert, 874 A.2d 353 \(D.C. 2005\).](#)

- As to the scope of judicial review, see [§ 461](#).

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[\[FN11\] Department of Public Works v. Colbert, 874 A.2d 353 \(D.C. 2005\)](#) (not allowed).

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[\[FN12\] Lawley v. Department of Higher Educ., 36 P.3d 1239, 160 Ed. Law Rep. 607 \(Colo. 2001\); State Personnel Div., Dept. of Administration v. Child Support Investigators, 2002 MT 46, 308 Mont. 365, 43 P.3d 305 \(2002\).](#)

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[\[FN13\] Raphael v. Okyiri, 740 A.2d 935 \(D.C. 1999\).](#)

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## **§ 458. Burden of proof and findings**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.32](#), [72.61](#)

The employing agency generally bears the burden of proof by a preponderance of evidence that the employee engaged in the conduct on which the disciplinary charge was based and that such conduct constituted a cause for discipline under the applicable statutes.<sup>[FN1]</sup> However, the employee may have the burden of persuasion on such issues as that the discharge was in reprisal for engaging in protected activities.<sup>[FN2]</sup>

Where the asserted ground for a layoff is the economy, the proof in an administrative proceeding must overcome the presumption of good faith, and it is not of consequence that other considerations contributed to the layoff.<sup>[FN3]</sup>

While specific findings of fact are necessary for judicial review,<sup>[FN4]</sup> written findings are not necessary where a personnel board's reasoning is otherwise apparent.<sup>[FN5]</sup>

### **CUMULATIVE SUPPLEMENT**

#### **Cases:**

When the state terminates a person's employment, on appeal of that decision, the Merit Employee Relations Board (MERB) presumes that the state did so properly. [29 West's Del.C. § 5949\(b\)](#). [Avalone v. State/Dept. of Health and Social Services \(DHSS\), 14 A.3d 566 \(Del. 2011\)](#).

**[END OF SUPPLEMENT]**

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[FN1] [Pima County v. Pima County Law Enforcement Merit System Council, 211 Ariz. 224, 119 P.3d 1027 \(2005\)](#) (rule that requires that the discipline be overturned if some or all of the charges were not proven to the satisfaction of the reviewing entity requires by a preponderance of the evidence); [California Correctional Peace Officers Assn. v. State Personnel Bd., 10 Cal. 4th 1133, 43 Cal. Rptr. 2d 693, 899 P.2d 79 \(1995\)](#); [Raphael v. Okyiri, 740 A.2d 935 \(D.C. 1999\)](#); [Whittier v. Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130 \(2002\)](#); [In re Grievance of Brown, 177 Vt. 365, 2004 VT 109, 865 A.2d 402 \(2004\)](#).

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[FN2] [Raphael v. Okyiri, 740 A.2d 935 \(D.C. 1999\)](#).

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[FN3] [Elwell v. North Bergen Tp., Hudson County, 13 N.J. Super. 330, 80 A.2d 443 \(App. Div. 1951\)](#).

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[FN4] [McIntosh v. Personnel Commission, 117 N.H. 334, 374 A.2d 436 \(1977\)](#); [Airhart v. Carpenter, 164 W. Va. 73, 260 S.E.2d 729 \(1979\)](#).

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[FN5] [Sheriff of Plymouth County v. Plymouth County Personnel Bd., 440 Mass. 708, 802 N.E.2d 71 \(2004\)](#).

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**§ 459. Costs and fees**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.70](#)

The view has been taken that a public officer defending oneself before an administrative body from removal, when it must be for cause, is protecting an important state interest and is therefore entitled to have the state pay his or her counsel fees and expenses.[\[FN1\]](#) However, it is elsewhere often held that a review commission's statutory power does not include awarding attorney's fees to the public employee, even after a successful administrative appeal.[\[FN2\]](#) Still other statutes allow an award of attorney's fees to a public official if the final determination in a removal proceeding is favorable to the accused official.[\[FN3\]](#) Costs and fees may also be denied by a personnel commission if the agency's position was substantially justified.[\[FN4\]](#)

Public employees seeking to vindicate constitutionally based interests may not be required to compensate the state for the cost of the administrative law judge.[\[FN5\]](#)

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[\[FN1\]](#) [King v. Thomson, 119 N.H. 219, 400 A.2d 1169 \(1979\).](#)

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[\[FN2\]](#) [Sanchez v. State, Dept. of Correction, 143 Idaho 239, 141 P.3d 1108 \(2006\); Mississippi Employment Sec. Com'n v. Culbertson, 832 So. 2d 519 \(Miss. 2002\); Cohn v. Department of Corrections of State of Wash., 78 Wash. App. 63, 895 P.2d 857 \(Div. 2 1995\).](#)

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[\[FN3\]](#) [State ex rel. Steffen v. Peterson, 2000 SD 39, 607 N.W.2d 262 \(S.D. 2000\)](#) (strictly construed to require exoneration).

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[\[FN4\]](#) [Board of Regents of University of Wisconsin System v. State Personnel Com'n, 2002 WI 79, 254 Wis. 2d 148, 646 N.W.2d 759, 166 Ed. Law Rep. 760 \(2002\).](#)

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[\[FN5\]](#) [California Teachers Ass'n v. State of California, 20 Cal. 4th 327, 84 Cal. Rptr. 2d 425, 975 P.2d 622, 138 Ed. Law Rep. 1147 \(1999\).](#)

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## § 460. Generally

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.40](#), [72.45](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 61 et seq.](#) (Petitions for judicial review)

An employee who may be terminated only for cause has a property interest in continued employment<sup>[FN1]</sup> sufficient to entitle the employee to judicial review of an administrative decision to terminate his or her employment.<sup>[FN2]</sup>

A state personnel act may govern over an administrative procedure act, with respect to what procedures must be followed to appeal a decision in an employment matter,<sup>[FN3]</sup> while, elsewhere, the administrative procedure act governs.<sup>[FN4]</sup>

The time to appeal is generally jurisdictional,[FN5] and a public employee's failure to file a complaint within the period required by statute after being discharged deprives the court of jurisdiction.[FN6] Laches may also bar judicial review, either because reinstatement would require discharge of a substitute public employee or because the employing agency might be compelled to incur double payment of back pay to the discharged employee and salary to the replacement.[FN7] The employee may be required to serve the employing government department, as the state agency taking disciplinary action, but not the personnel board or the administrative law judge.[FN8]

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[\[FN1\] § 441.](#)

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[\[FN2\] Thomas v. Long, 207 S.W.3d 334 \(Tex. 2006\).](#)

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[\[FN3\] Stacey v. Department of Labor, 134 Idaho 727, 9 P.3d 530 \(2000\).](#)

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[\[FN4\] Carson v. South Carolina Dept. of Natural Resources, 371 S.C. 114, 638 S.E.2d 45 \(2002\).](#)

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[\[FN5\] Fisher v. District of Columbia, 803 A.2d 962 \(D.C. 2002\).](#)

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[\[FN6\] Enriquez v. Merit System Council, 197 Colo. 14, 589 P.2d 492 \(1979\).](#)

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[\[FN7\] Johnson v. City of Loma Linda, 24 Cal. 4th 61, 99 Cal. Rptr. 2d 316, 5 P.3d 874 \(2000\).](#)

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[\[FN8\] North Dakota Dept. of Human Services v. Ryan, 2003 ND 196, 672 N.W.2d 649 \(N.D. 2003\).](#)

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**§ 461. Scope of review**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) 72.49 to 72.55

The review of personnel decisions by an administrative agency is limited to the record.<sup>[FN1]</sup> While the question whether the facts establish just cause for discipline of a public employee is a matter of law that is fully reviewable,<sup>[FN2]</sup> the court is not at liberty to substitute its opinion or decision for that of the agency or to judge the credibility of witnesses in the administrative proceeding.<sup>[FN3]</sup> The scope of judicial review of agency actions in public employee discipline cases is generally limited to discerning whether procedural due process requirements were met and whether the agency action was arbitrary and capricious, or unsupported by substantial evidence,<sup>[FN4]</sup> or a similar standard.<sup>[FN5]</sup>

Because the decision of a personnel commission effectively displaces the proposed decision of the hearing officer, and because the appellate court is directed to review "a decision of the commission," it is the full commission's decision, rather than the hearing officer's, that is to be reviewed.<sup>[FN6]</sup> The court may determine whether a personnel commission's decision to adopt its own findings of fact and to reject many of the ALJ's is supported by the whole record.<sup>[FN7]</sup> Such a board's findings of fact are presumed to be lawful and reasonable, and its order will be reviewed for an error of law or for whether the court is satisfied, by a clear preponderance of the evidence before it, that the board's order is unjust or unreasonable.<sup>[FN8]</sup>

Questions of jurisdiction, such as whether a board may reopen and reconsider its decision to discharge a public employee after a final decision, are cognizable in judicial review.<sup>[FN9]</sup>

In reviewing agency determinations concerning what rules of conduct for employees the agency may enforce, courts are constrained to give considerable deference to the agency's discretion.<sup>[FN10]</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Termination of a nonprobationary public employee substantially affects that employee's fundamental vested right in employment; accordingly, when ruling on a petition for a writ of administrative mandamus seeking review of procedures that resulted in the employee's termination, the trial court examines the administrative record and exercises its

independent judgment to determine if the weight of the evidence supports the findings upon which the agency's discipline is based or if errors of law were committed by the administrative tribunal. [Bautista v. County of Los Angeles, 190 Cal. App. 4th 869, 2010 WL 4457712 \(2d Dist. 2010\)](#).

On review of an administrative agency's discharge of an employee, Appellate Court takes the administrative agency's factual findings as prima facie true and correct; it will not reverse those findings unless they are against the manifest weight of the evidence. [Dookeran v. County of Cook, 920 N.E.2d 633, 30 I.E.R. Cas. \(BNA\) 200 \(Ill. App. Ct. 1st Dist. 2009\)](#).

## **[END OF SUPPLEMENT]**

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[FN1] [Calhoun v. Bailar, 626 F.2d 145 \(9th Cir. 1980\)](#).

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[FN2] [Irvine v. City of Sioux Falls, 2006 SD 20, 711 N.W.2d 607 \(S.D. 2006\)](#).

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[FN3] [Raphael v. Okyiri, 740 A.2d 935 \(D.C. 1999\)](#) (court gives deference to credibility findings by ALJ); [Fritzshall v. Board of Police Com'rs, 886 S.W.2d 20 \(Mo. Ct. App. W.D. 1994\)](#).

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[FN4] [Ringquist v. Hampton, 582 F.2d 1138 \(7th Cir. 1978\)](#); [Pan v. State Personnel Bd., 180 Cal. App. 3d 351, 225 Cal. Rptr. 682 \(3d Dist. 1986\)](#); [Lawley v. Department of Higher Educ., 36 P.3d 1239, 160 Ed. Law Rep. 607 \(Colo. 2001\)](#); [District of Columbia v. Freneau, 869 A.2d 711 \(D.C. 2005\)](#); [Sanchez v. Idaho Dept. of Correction, 134 Idaho 523, 5 P.3d 984 \(2000\)](#); [Harris v. Mississippi Dept. of Corrections, 831 So. 2d 1105 \(Miss. 2002\)](#) (statutory standard of review); [Brown v. Personnel Advisory Bd. of State of Mo., 879 S.W.2d 581 \(Mo. Ct. App. W.D. 1994\)](#) (discussing what constitutes substantial evidence); [Kennedy v. Marion Correctional Inst., 69 Ohio St. 3d 20, 1994-Ohio-83, 630 N.E.2d 324 \(1994\)](#) (ample evidence of sexual harassment).

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[FN5] [North Dakota Dept. of Transp. v. Central Personnel Div., 1999 ND 198, 600 N.W.2d 861 \(N.D. 1999\)](#) (whether hearing officer's findings are supported by a preponderance of the evidence).

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[FN6] [Sanchez v. State, Dept. of Correction, 143 Idaho 239, 141 P.3d 1108 \(2006\)](#).

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[FN7] [Ritter v. Department of Human Resources, 118 N.C. App. 564, 455 S.E.2d 901 \(1995\)](#).

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[FN8] [Appeal of Booker, 139 N.H. 337, 653 A.2d 1084 \(1995\)](#), as modified on reh'g, (Feb. 23, 1995).

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[FN9] [Clark v. State Employees Appeals Bd., 363 A.2d 735 \(Me. 1976\)](#).

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[FN10] [Rotolo v. Merit Systems Protection Bd., 636 F.2d 6 \(1st Cir. 1980\)](#).

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## § 462. Effect of bias

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.40](#)

Assertions of actual bias in the administrative tribunal regarding a public employee's post-termination administrative proceedings raise a material issue of fact concerning the adequacy of the those proceedings.<sup>[FN1]</sup> However, the issue whether an administrative law judge was prejudiced was moot, where the ALJ at issue was replaced by another, who completely and independently reviewed the issues.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [Clements v. Airport Authority of Washoe County](#), 69 F.3d 321 (9th Cir. 1995); [Edgar v. Dowling](#), 96 A.D.2d 510, 464 N.Y.S.2d 816 (2d Dep't 1983) (determination annulled due to highway superintendent's participation).



[\[FN2\] Gigeous v. Eastern Correctional Inst., 363 Md. 481, 769 A.2d 912 \(2001\)](#) (noting that the officer was afforded the relief to which he might have been entitled had recusal been found to be appropriate—a new hearing in front of a different ALJ).

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## **§ 463. Review of sanction**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.56](#)

A court reviewing the penalty in a disciplinary proceeding against a public officer should not fix the penalty itself[\[FN1\]](#) nor determine the precise sanction to be imposed.[\[FN2\]](#) The agency's discretion will not be disturbed absent a determination that the penalty was grossly excessive or a manifest abuse of discretion.[\[FN3\]](#) A court is not authorized to overturn a lawful and authorized sanction unless its disproportionality or the abuse of discretion was so extreme that the decision was arbitrary or capricious.[\[FN4\]](#) While factors such as the loss of a pension and length of service might be significant when considering whether a penalty shocks one's sense of fairness, and thus constitutes an abuse of

discretion,[FN5] a court does not have the discretionary authority in the interest of justice to review the sanction, where it does not shock the judicial conscience.[FN6]

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[FN1] [Richardson v. Board of Supervisors, 203 Cal. App. 3d 486, 250 Cal. Rptr. 1 \(5th Dist. 1988\)](#).

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[FN2] [Gillen v. Smithtown Library Bd. of Trustees, 94 N.Y.2d 776, 699 N.Y.S.2d 695, 721 N.E.2d 945 \(1999\)](#).

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[FN3] [Richardson v. Board of Supervisors, 203 Cal. App. 3d 486, 250 Cal. Rptr. 1 \(5th Dist. 1988\)](#) (describing the factors considered and the agency's power on remand).

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[FN4] [Maryland Aviation Admin. v. Noland, 386 Md. 556, 873 A.2d 1145 \(2005\)](#).

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[FN5] [Kelly v. Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280 \(2001\)](#).

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[FN6] [Ellis v. Mahon, 11 N.Y.3d 754, 865 N.Y.S.2d 589, 895 N.E.2d 518 \(2008\)](#).

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#### § 464. Review of sanction—Termination of employment

##### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.50](#), [72.53](#), [72.56](#)

Where the power to remove appointed civil officers is discretionary, the courts will not inquire into the grounds for removal.[FN1] Furthermore, judicial review of a determination to discharge a probationary employee is limited to an inquiry into whether or not the termination was in bad faith.[FN2] Absent a violation of constitutional rights, judicial review is not available with regard to the firing of an employee who is terminable at will.[FN3]

Although government agencies have broad discretion to determine which employees to retain, when the record in a given case clearly establishes that unconstitutional conditions have been imposed on the retention of public employment, a court will not accord the usual deference.[FN4] When confronted with firings that implicate a public employee's First Amendment rights, the courts are required to conduct an individualized and searching review of the factors asserted by the employer to justify the discharge, the purpose being to assure that those factors have been applied with the deference to be accorded to those rights.[FN5]

The question whether an individual official has the authority, as the appointing authority, to terminate an employee is reviewed de novo, as purely a legal question.[FN6] A legal conclusion that certain conduct constituted grounds for permanent removal of the employee is reviewed de novo.[FN7] However, the general question of executive policy involved in a removal, such as whether the removal of a particular administrator furthered the efficient operation of the agency,[FN8] is not subject to judicial inquiry.[FN9]

A court may not be authorized to overturn the state's termination of an employee based on a finding that the termination was disproportionate to the offense, where the sanction imposed was lawful, authorized, within the agency's discretion, and not arbitrary or capricious.[FN10]

#### CUMULATIVE SUPPLEMENT

##### Cases:

Four-member State Personnel Board, on review of ALJ's decision reversing Department of Human Services (DHS) termination of employee, required three votes to uphold ALJ's decision, pursuant to statute requiring three votes of Board to overturn a decision of an appointing authority, since upholding the ALJ decision would entail overturning the decision of the appointing authority, DHS. [West's C.R.S.A. § 24–50–103\(6\)](#). [Colorado Dept. of Human Services v. Maggard](#), 248 P.3d 708 (Colo. 2011).

[END OF SUPPLEMENT]

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[\[FN1\] Burkholder v. Hutchison, 403 Pa. Super. 498, 589 A.2d 721 \(1991\).](#)

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[\[FN2\] Beacham v. Brown, 215 A.D.2d 334, 627 N.Y.S.2d 358 \(1st Dep't 1995\).](#)

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[\[FN3\] Widder v. Durango School Dist. No. 9-R, 85 P.3d 518, 185 Ed. Law Rep. 1012 \(Colo. 2004\)](#), as modified on denial of reh'g, (Mar. 15, 2004).

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[\[FN4\] Ofsevit v. Trustees of Cal. State University & Colleges, 21 Cal. 3d 763, 148 Cal. Rptr. 1, 582 P.2d 88 \(1978\).](#)

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[\[FN5\] Tygrett v. Barry, 627 F.2d 1279 \(D.C. Cir. 1980\).](#)

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[\[FN6\] Public Service Com'n of Maryland v. Wilson, 389 Md. 27, 882 A.2d 849 \(2005\).](#)

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[\[FN7\] In re Taylor, 158 N.J. 644, 731 A.2d 35 \(1999\).](#)

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[\[FN8\] McIntosh v. Personnel Commission, 117 N.H. 334, 374 A.2d 436 \(1977\).](#)

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[\[FN9\] In re Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, 118 A.L.R. 166 \(1938\).](#)

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[\[FN10\] Maryland Aviation Admin. v. Noland, 386 Md. 556, 873 A.2d 1145 \(2005\).](#)

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**§ 465. Review of sanction—Suspension**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.50](#), [72.53](#), [72.56](#)

The proper standard for review of a suspension order is whether it contains findings that bear some reasonable relation to the charge.<sup>[FN1]</sup> The courts may inquire into the sufficiency of an order of suspension, but may not review the sufficiency of evidence to support the charges.<sup>[FN2]</sup>

**Observation:** It has been held that the term "dismissal," as used in a statute authorizing an individual dismissed by a hearing board to appeal to a court, encompasses a suspension ordered by such a board.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Bass v. Askew, 342 So. 2d 145 \(Fla. Dist. Ct. App. 1st Dist. 1977\).](#)

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<sup>[FN2]</sup> [Gamble v. Kelley, 219 Tenn. 311, 409 S.W.2d 374 \(1966\).](#)

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<sup>[FN3]</sup> [North Dakota Game and Fish Dept. v. Brashears, 325 N.W.2d 671 \(N.D. 1982\).](#)

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**§ 466. Review of governor's personnel decision**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.40](#), [72.41\(1\)](#)

Courts have sometimes refused to inquire into the removal of an officer by a governor, on the ground that it would amount to a direct attack on the executive's independence.<sup>[FN1]</sup> In a collateral proceeding in which the removal of a public officer by a governor is brought in question, the courts will determine the questions of the governor's power and jurisdiction,<sup>[FN2]</sup> including whether legal cause was shown.<sup>[FN3]</sup> The court may inquire into the facts of removal to determine whether the governor has kept within his or her jurisdiction.<sup>[FN4]</sup> In any case, if there is evidence to support the governor's decision on disputed facts, it is conclusive.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [In re Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, 118 A.L.R. 166 \(1938\).](#)

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<sup>[FN2]</sup> [State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 \(1934\).](#)

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<sup>[FN3]</sup> [Holmes v. Osborn, 57 Ariz. 522, 115 P.2d 775 \(1941\); People v. Shawver, 30 Wyo. 366, 222 P. 11 \(1924\).](#)

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<sup>[FN4]</sup> [People v. Shawver, 30 Wyo. 366, 222 P. 11 \(1924\).](#)

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<sup>[FN5]</sup> [State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 \(1934\); People ex rel. Johnson v. Coffey, 237 Mich. 591, 213 N.W. 460, 52 A.L.R. 1 \(1927\).](#)

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## § 467. Nature of action

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [74](#)

Statutes sometimes provide for the institution of proceedings to remove public officials by the state's attorney general<sup>[FN1]</sup> or on an accusation by a grand jury.<sup>[FN2]</sup> The remedy provided by removal statutes is drastic where the usual method of removing public officeholders is by resorting to the ballot, and the statutory grounds for removal are strictly construed.<sup>[FN3]</sup>

The removal proceeding is summary in nature.<sup>[FN4]</sup> Under some statutes, it is triable as an equitable action.<sup>[FN5]</sup>

A suit brought for the purpose of having an incumbent removed from office will not be entertained where the question has become moot by the expiration of the term of office while the suit is pending.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [L'Acquarius v. Hampton, 1982 OK 34, 642 P.2d 1143 \(Okla. 1982\)](#) (holding that inmates incarcerated in state penal institutions for felony convictions are not "reputable citizens of the county" for the purposes of a statute requiring

verification of the petition by a certain number of them).

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[FN2] [Hale v. Board of County Com'rs of Seminole County, 1979 OK 158, 603 P.2d 761 \(Okla. 1979\).](#)

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[FN3] [State ex rel. Steffen v. Peterson, 2000 SD 39, 607 N.W.2d 262 \(S.D. 2000\).](#)

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[FN4] [State v. Bartz, 224 N.W.2d 632 \(Iowa 1974\); State ex rel. Ralston v. Blain, 189 Kan. 575, 370 P.2d 415, 92 A.L.R.2d 1115 \(1962\).](#)

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[FN5] [State v. Bartz, 224 N.W.2d 632 \(Iowa 1974\).](#)

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[FN6] [Coffey v. State, 207 Tenn. 260, 339 S.W.2d 1, 83 A.L.R.2d 1000 \(1960\).](#)

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**§ 468. Pleadings**



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### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 17 to 23](#) (Pleadings in actions to oust de facto officers)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 25 to 33](#) (Pleadings to remove de jure officers)

The charge that is the basis for a judicial proceeding for the removal of a public officer should be sufficiently explicit to give the public officer notice of what one is required to answer;[FN1] mere restatement of the statutory grounds for removal is insufficient for this purpose.[FN2] Lack of notice provided by general charges may not be cured by allegations made during a hearing.[FN3] Furthermore, it has been said that a complaint that is not sufficiently specific to apprise an officer whose removal is sought of the charges may not be amended.[FN4]

Under some statutes, there is no requirement that the petition for ouster of a public officer state that the investigation is complete, or that it in fact be complete.[FN5]

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[FN1] [Brown v. Wetherington, 250 Ga. 682, 300 S.E.2d 680 \(1983\)](#).

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[FN2] [2,867 Signers of Petition for Removal of Mack v. Mack, 66 Ohio App. 2d 79, 20 Ohio Op. 3d 142, 419 N.E.2d 1108 \(9th Dist. Medina County 1979\)](#).

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[FN3] [Brown v. Wetherington, 250 Ga. 682, 300 S.E.2d 680 \(1983\)](#).

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[FN4] [2,867 Signers of Petition for Removal of Mack v. Mack, 66 Ohio App. 2d 79, 20 Ohio Op. 3d 142, 419 N.E.2d 1108 \(9th Dist. Medina County 1979\)](#).

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[FN5] [State ex rel. Stovall v. Meneley, 271 Kan. 355, 22 P.3d 124 \(2001\)](#).

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## § 469. Proof

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [74](#)

In proceedings to remove a public officer, the proof of the offense charged generally need not meet the standard of proof beyond a reasonable doubt.<sup>[FN1]</sup> It may be required that the charges be supported by clear and convincing evidence,<sup>[FN2]</sup> or by a preponderance of the evidence.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [State ex rel. Ralston v. Blain, 189 Kan. 575, 370 P.2d 415, 92 A.L.R.2d 1115 \(1962\).](#)

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<sup>[FN2]</sup> [State v. Bartz, 224 N.W.2d 632 \(Iowa 1974\); State ex rel. Thompson v. Walker, 845 S.W.2d 752, 80 Ed. Law Rep. 1116 \(Tenn. Ct. App. 1992\).](#)

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<sup>[FN3]</sup> [In re Bazan, 251 S.W.3d 39 \(Tex. 2008\).](#)

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## § 470. Appeal

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [74](#)

In an action for removal of a public officer, the appellate court will consider whether the record compiled in the trial court contains sufficient evidence of misconduct to necessitate removal from office,[\[FN1\]](#) and, in some jurisdictions, the appellate court must affirm if the trial court properly applied the law and the decision was supported by any legal evidence.[\[FN2\]](#)

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[\[FN1\]](#) [State v. Bartz, 224 N.W.2d 632 \(Iowa 1974\).](#)

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[\[FN2\]](#) [Logan v. Personnel Bd. of Jefferson County, 657 So. 2d 1125 \(Ala. Civ. App. 1995\),](#) on reh'g, (Mar. 17, 1995).

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West's Key Number Digest, [Constitutional Law](#) [1475\(8\)](#), [1475\(9\)](#), [1947](#)

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## **Trial Strategy**

[Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech, 22 Am. Jur. Proof of Facts 3d 203](#)

[Constitutional Employment Litigation: Political Discharge Case, 43 Am. Jur. Trials 1](#)

## **Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 54 to 67](#)

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**§ 471. Rights of action and damages**

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## Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 54 to 56](#) (Complaints by discharged public employees)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 67](#) (Judgment granting preemptory writ and writ for reinstatement and backpay)

Remedies for public employees who have been wrongfully discharged generally depend on statutes protecting government workers,[\[FN1\]](#) public policy exceptions to the employment at-will doctrine,[\[FN2\]](#) protection of free speech rights,[\[FN3\]](#) and "whistleblowing" statutes.[\[FN4\]](#)

The damages recoverable in a wrongful removal action include the compensation attached to the office from the time of removal until reinstatement.[\[FN5\]](#) However, a public employee is not entitled to lost wages and benefits for the period after that person unreasonably refused a reinstatement offer.[\[FN6\]](#) Also, damages consisting of salary and benefits may be limited to such time until the position was eliminated by the legislature.[\[FN7\]](#)

An aggrieved public employee bears the burden, in an action for wrongful discharge, of producing legally admissible evidence demonstrating that the dismissal was for constitutionally impermissible reasons, violative of a statutory proscription, or contrary to an express contractual provision.[\[FN8\]](#)

The rule that the acts of a de facto officer are valid[\[FN9\]](#) was not intended to bar an incumbent, who is holding over beyond the definite term pursuant to legislation authorizing this until the appointment of a qualified successor, from pursuing a claim for damages because of his or her unlawful removal from office.[\[FN10\]](#)

Laches may be a defense to causes of action brought by discharged public sector employees seeking reinstatement and back pay.[\[FN11\]](#) A wrongfully discharged public employee must mitigate damages.[\[FN12\]](#)

Under statutes in some states, punitive damages may be recovered in actions by former public employees against their employers, where immunity is not established.[\[FN13\]](#) A wrongfully terminated public employee is not entitled to recover for any increased tax liability incurred as a result of a lump-sum payment of back wages.[\[FN14\]](#)

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[\[FN1\]](#) [Am. Jur. 2d, Wrongful Discharge § 4.](#)

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[\[FN2\]](#) [Am. Jur. 2d, Wrongful Discharge §§ 53 et seq.](#)

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[\[FN3\]](#) [Am. Jur. 2d, Wrongful Discharge § 79.](#)

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[\[FN4\] Am. Jur. 2d, Wrongful Discharge §§ 117 et seq.](#)

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[\[FN5\] Chartrand v. Registrar of Motor Vehicles, 347 Mass. 470, 198 N.E.2d 425 \(1964\); State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn., 93 Ohio St. 3d 558, 2001-Ohio-1608, 757 N.E.2d 339, 158 Ed. Law Rep. 435 \(2001\)](#)  
(damages continue to accrue until reinstatement).

- As to reinstatement, see [§ 474](#).

- As to backpay, see [§ 475](#).

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[\[FN6\] Baseden v. State, 174 P.3d 233 \(Alaska 2008\)](#), cert. denied, [128 S. Ct. 2089, 170 L. Ed. 2d 824 \(2008\)](#).

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[\[FN7\] Dubrowski v. State ex rel. Wyoming Liquor Com'n, 1 P.3d 631 \(Wyo. 2000\)](#).

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[\[FN8\] Zaretsky v. New York City Health and Hospitals Corp., 84 N.Y.2d 140, 615 N.Y.S.2d 341, 638 N.E.2d 986 \(1994\)](#).

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[\[FN9\] § 237](#).

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[\[FN10\] Sansone v. Clifford, 219 Conn. 217, 592 A.2d 931 \(1991\)](#).

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[\[FN11\] Summers v. Village of Durand, 267 Ill. App. 3d 767, 205 Ill. Dec. 321, 643 N.E.2d 272 \(2d Dist. 1994\)](#).

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[\[FN12\] Ryan v. Superintendent of Schools of Quincy, 374 Mass. 670, 373 N.E.2d 1178 \(1978\); State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn., 105 Ohio St. 3d 476, 2005-Ohio-2974, 829 N.E.2d 298, 198 Ed. Law Rep. 952 \(2005\)](#).

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[\[FN13\] Runyon v. Superior Court, 187 Cal. App. 3d 878, 232 Cal. Rptr. 101 \(4th Dist. 1986\)](#) (involving an action by former employees of a county marshal's department for wrongful employment practices, intentional infliction of emotional distress, and violation of civil rights brought under [42 U.S.C.A. § 1983](#)).

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[\[FN14\] Christoffer v. Department of Fire, 734 So. 2d 629 \(La. 1999\)](#).

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**§ 472. Equitable remedies; injunction**

**West's Key Number Digest**

West's Key Number Digest, [Injunction](#) [81](#)

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[Injunction as remedy against removal of public officer, 34 A.L.R.2d 554](#)

As a general rule, a court may not enjoin an officer or board from removing a public officer<sup>[FN1]</sup> or public employee,<sup>[FN2]</sup> or compel the removal of a replacement.<sup>[FN3]</sup> Furthermore, injunctive relief will be denied to a public employee seeking to enjoin the employer from altering or taking action to terminate the plaintiff's employment, where the employee has an adequate remedy at law through a grievance procedure provided under a collective bargaining agreement.<sup>[FN4]</sup>

Even so, injunctions have been granted in some cases, where it appeared that the removal was in excess of authority<sup>[FN5]</sup> or where the plaintiff was still in actual possession of the office from which removal was sought.<sup>[FN6]</sup> Furthermore, a temporary injunction enjoining the demotion of a public employee where discrimination is alleged has been granted, where the employee has shown a likelihood of prevailing on the merits.<sup>[FN7]</sup>

Although an equitable action will not lie to try title to an office,<sup>[FN8]</sup> courts have determined the validity of proceedings to remove the incumbent as incidental to a suit to enjoin an appointee from taking office.<sup>[FN9]</sup>

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<sup>[FN1]</sup> [Walton v. House of Representatives of State of Okl.](#), 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 (1924); [Nelson v. Wainwright](#), 223 Ga. 429, 156 S.E.2d 82 (1967); [Weiss v. Ziegler](#), 327 Pa. 100, 193 A. 642, 112 A.L.R. 102 (1937); [Fuller v.](#)



[Mitchell, 269 S.W.2d 517 \(Tex. Civ. App. Dallas 1954\)](#), writ refused n.r.e.; [Emerson v. Hughes, 117 Vt. 270, 90 A.2d 910, 34 A.L.R.2d 539 \(1952\)](#); [Christie v. Lueth, 265 Wis. 326, 61 N.W.2d 338 \(1953\)](#).

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[FN2] [Holley v. McDonald, 154 Conn. 228, 224 A.2d 727 \(1966\)](#).

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[FN3] [Coghlan v. Borough of Darby, 844 A.2d 624 \(Pa. Commw. Ct. 2004\)](#).

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[FN4] [Sotire v. City of Stamford, 19 Conn. App. 505, 563 A.2d 1021 \(1989\)](#).

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[FN5] [Waters v. Karst, 235 So. 2d 222 \(La. Ct. App. 3d Cir. 1970\)](#); [Lemasters v. Willman, 281 S.W.2d 580 \(Mo. Ct. App. 1955\)](#).

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[FN6] [Day v. Andrews, 279 Ala. 563, 188 So. 2d 523 \(1966\)](#); [Mills v. Patton, 233 Ark. 755, 346 S.W.2d 689 \(1961\)](#); [Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 \(1935\)](#); [McDonald v. Brooks, 215 Tenn. 535, 387 S.W.2d 803 \(1965\)](#); [Lockard v. Wiseman, 139 W. Va. 306, 80 S.E.2d 427 \(1954\)](#) (recognizing rule).

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[FN7] [McCurdy v. School Bd. of Palm Beach County, Fla., 367 F. Supp. 747 \(S.D. Fla. 1973\)](#), opinion supplemented, [388 F. Supp. 599 \(S.D. Fla. 1974\)](#) and judgment aff'd, [509 F.2d 540 \(5th Cir. 1975\)](#).

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[FN8] [§ 427](#).

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[FN9] [Mills v. Patton, 233 Ark. 755, 346 S.W.2d 689 \(1961\)](#); [Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 \(1935\)](#).

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G. Remedies of Officer or Employee

1. In General

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**§ 473. Stay of judgment or removal**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [61](#)

Under a statute pursuant to which a conviction of certain officers by a jury for any felony or misdemeanor operates as an immediate removal from office, [\[FN1\]](#) a motion to set aside an officer's misdemeanor conviction of official misconduct would result in staying the automatic removal from office, if brought before a court with criminal jurisdiction, but in the absence of such a request, relief may not be granted. [\[FN2\]](#)

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[\[FN1\]](#) [§ 191.](#)

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[\[FN2\]](#) [Sullivan v. State, 572 S.W.2d 778 \(Tex. Civ. App. El Paso 1978\)](#), writ refused n.r.e., (Apr. 11, 1979).

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**§ 474. Reinstatement**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [76](#)

**Forms**

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 57 et seq.](#) (Complaints or petitions to compel reinstatement)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 67 et seq.](#) (Judgment granting preemptory writ and writ for reinstatement and backpay)

The usual appropriate remedy for wrongful dismissal, removal, or suspension of a public officer or employee is reinstatement,[FN1] with back pay and other benefits, less offsets.[FN2] While mandamus as a proper remedy to reinstate one illegally removed from office when another claimant is in possession,[FN3] the equitable remedy of reinstatement is not appropriate, despite the unconstitutional firing of a public employee, where a new superior with the right to appoint the staff had been elected subsequent to the decision to terminate the employee.[FN4]

In some instances, the power of reinstatement may reside in an administrative body rather than in a court.[FN5] However, the view has sometimes been followed that if charges on which the removal of an employee is based relate to the merits of the employee's work performance, and if the charges are supported by findings of the appropriate reviewing authority, that authority may not modify the decision to remove the employee by reinstating him or her.[FN6]

While it has been said that abolition of the position does not prevent reinstatement, but simply limits the period for which it may be ordered,[FN7] it was also found that a state personnel board lacked jurisdiction to order reinstatement once a proposed layoff plan had been approved by the board.[FN8] On the other hand, reinstatement to a former or comparable position may be proper where the employee was not given proper notice of the elimination of the employee's position.[FN9] Reassignment, rather than reinstatement, may be the proper remedy if the employee's prior position was abolished, but the employee was qualified for a similar position and more senior than the present holder of that position.[FN10] Also, a state board's authority might be limited to ordering reinstatement and does not extend to ordering the creation of new jobs.[FN11]

A public employee's election to retire should not be considered voluntary, so as to preclude the employee from seeking reinstatement for wrongful termination, when the employee's only alternative at the time of that decision was a layoff or other reduction in work.[\[FN12\]](#)

Where proper, reinstatement may be granted conditionally, such as on health clearance by a physician.[\[FN13\]](#) While reinstatement must be to the same job classification, it need not be to the same job location.[\[FN14\]](#)

Statutes sometimes mandate a reinstatement hearing where a non-elected official is stripped of office based solely on conviction of a felony or crime involving a violation of the oath of office that is later reversed or vacated, but do not apply to an acquittal, since one who is acquitted is not stripped of the office by operation of the statute.[\[FN15\]](#)

A rejected probationary employee may be reinstated only on a showing that there was not any substantial evidence to support the rejection.[\[FN16\]](#)

A public employee may waive reinstatement, such as where one obtained other work while judicial review was pending.[\[FN17\]](#) While a waiver may be enforced if the public employer changed its position as a result of the waiver, the burden is on the employer to prove that waiver.[\[FN18\]](#)

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[\[FN1\] \*Borges Colon v. Roman-Abreu\*, 438 F.3d 1 \(1st Cir. 2006\)](#) (reinstatement after violation of employees' First Amendment political affiliation rights); [Young v. Hampton](#), 568 F.2d 1253 (7th Cir. 1977); [Bishop v. Tice](#), 622 F.2d 349 (8th Cir. 1980); [Civil Service Bd. of Tuscaloosa County v. Krout](#), 357 So. 2d 991 (Ala. Civ. App. 1978); [Stephens v. County of Tulare](#), 38 Cal. 4th 793, 43 Cal. Rptr. 3d 302, 134 P.3d 288 (2006) (construing a statute on the reinstatement of an employee dismissed for disability, but finding that it did not apply where the employee was directed to leave work temporarily until his medical condition improved); [Chotkowski v. Connecticut Personnel Appeal Bd.](#), 176 Conn. 1, 404 A.2d 868 (1978); [Schall v. State ex rel. Dept. of Human Resources](#), 94 Nev. 660, 587 P.2d 1311 (1978); [Matter of New York City Transit Authority](#), 154 A.D.2d 680, 546 N.Y.S.2d 884 (2d Dep't 1989); [Karow v. Milwaukee County Civil Service Commission](#), 82 Wis. 2d 565, 263 N.W.2d 214 (1978).

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[\[FN2\] § 475.](#)

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[\[FN3\] Am. Jur. 2d, Mandamus § 291.](#)

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[\[FN4\] \*Van Ooteghem v. Gray\*, 774 F.2d 1332 \(5th Cir. 1985\).](#)

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[\[FN5\] \*Ex parte Burks\*, 487 So. 2d 905 \(Ala. 1985\); \*Department of Public Safety & Correctional Services v. Donahue\*, 400 Md. 510, 929 A.2d 512 \(2007\)](#) (discussing the administrative law judge's power in this regard, and also noting that the parties also have to cooperate, or the employee or quasi-adjudicative body must commence enforcement proceedings); [Mississippi Dept. of Human Services v. McNeel](#), 869 So. 2d 1013 (Miss. 2004) (decision of appeal board to reinstate employee upheld); [Toro v. Malcolm](#), 44 N.Y.2d 146, 404 N.Y.S.2d 558, 375 N.E.2d 739 (1978) (employing agency).

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[\[FN6\] Appeal of Coon, 60 Pa. Commw. 504, 432 A.2d 266 \(1981\).](#)

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[\[FN7\] Director of Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission, 373 Mass. 401, 367 N.E.2d 1168 \(1977\).](#)

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[\[FN8\] Cibas v. New Mexico Energy, Minerals and Natural Resources Dept., 120 N.M. 127, 898 P.2d 1265 \(Ct. App. 1995\).](#)

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[\[FN9\] West Virginia Alcohol Beverage Control Admin. v. Scott, 205 W. Va. 398, 518 S.E.2d 639 \(1999\).](#)

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[\[FN10\] Appeal of Vicky Morton, 158 N.H. 76, 960 A.2d 332, 239 Ed. Law Rep. 136 \(2008\).](#)

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[\[FN11\] Indiana Dept. of Environmental Management v. West, 838 N.E.2d 408 \(Ind. 2005\).](#)

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[\[FN12\] State ex rel. McClaran v. City of Ontario, 119 Ohio St. 3d 105, 2008-Ohio-3867, 892 N.E.2d 440 \(2008\).](#)

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[\[FN13\] Johnson v. Personnel Appeal Bd., 174 Conn. 519, 391 A.2d 168 \(1978\)](#) (original dismissal based on illness).

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[\[FN14\] State ex rel. Ogan v. Teater, 54 Ohio St. 2d 235, 8 Ohio Op. 3d 217, 375 N.E.2d 1233 \(1978\).](#)

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[\[FN15\] Hays v. Ward, 179 A.D.2d 427, 578 N.Y.S.2d 168 \(1st Dep't 1992\).](#)

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[\[FN16\] Lee v. Board of Civil Service Comrs., 221 Cal. App. 3d 103, 270 Cal. Rptr. 47 \(4th Dist. 1990\).](#)

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[\[FN17\] Department of Public Safety & Correctional Services v. Donahue, 400 Md. 510, 929 A.2d 512 \(2007\).](#)

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[\[FN18\] State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn., 97 Ohio St. 3d 269, 2002-Ohio-6322, 779 N.E.2d 216, 171 Ed. Law Rep. 567 \(2002\).](#)

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## § 475. Back pay and other benefits

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) 76

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 57 et seq.](#) (Complaints or petitions to compel reinstatement)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 67 et seq.](#) (Judgment granting preemptory writ and writ for reinstatement and backpay)

Upon reinstatement,[[FN1](#)] or after an unwarranted personnel action, a public officer or employee is generally entitled to back pay[[FN2](#)] and other employment rights and benefits,[[FN3](#)] less offsets,[[FN4](#)] such as earnings from another employment.[[FN5](#)] There is authority that the monetary value of the back pay and benefits must be established with certainty.[[FN6](#)]

An injury caused by a justified termination of a public employee is not compensable by back pay.[[FN7](#)] Whether reinstatement will be granted without back pay is a matter within the discretion of the appropriate administrative agency; the determination must be based on criteria that are job-related and are related in some rational and logical manner to a person's competence and ability.[[FN8](#)]

An award of back pay does not depend on there being a position to which the employee can be reinstated.[[FN9](#)] Unless reinstatement is still proper,[[FN10](#)] one who retires voluntarily after being removed and while an appeal from the adverse action is pending is not entitled to back pay or other employment rights,[[FN11](#)] or may be entitled to back pay

only until the date when the employee voluntarily retired.[FN12] Also, a federal employee may not receive back pay for wrongful dismissal for a period when the person was psychiatrically disabled.[FN13]

A public employee was entitled to reinstatement with full pay retroactive to the date of a suspension, where the public entity did not have the statutory power to impose that sanction.[FN14]

A public employee does not waive the right to back pay where both the employer and employee are equally responsible for a delay in a disciplinary hearing.[FN15]

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[FN1] [§ 474.](#)

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[FN2] [Mitchell v. District of Columbia, 736 A.2d 228 \(D.C. 1999\) \(applying the Federal Back Pay Act, 5 U.S.C.A. § 5596\); Young v. Hampton, 568 F.2d 1253 \(7th Cir. 1977\); Bishop v. Tice, 622 F.2d 349 \(8th Cir. 1980\); Chotkowski v. Connecticut Personnel Appeal Bd., 176 Conn. 1, 404 A.2d 868 \(1978\); Fruhling v. Champaign County, 95 Ill. App. 3d 409, 51 Ill. Dec. 508, 420 N.E.2d 1066 \(4th Dist. 1981\); Mississippi Employment Sec. Com'n v. Culbertson, 832 So. 2d 519 \(Miss. 2002\) \(back pay to state employees as a result of their employer's failure to follow proper procedures and policies in promoting employees was not barred by a state constitutional provision\); Schall v. State ex rel. Dept. of Human Resources, 94 Nev. 660, 587 P.2d 1311 \(1978\); State ex rel. Couch v. Trimble Local School Dist. Bd. of Edn., 120 Ohio St. 3d 75, 2008-Ohio-4910, 896 N.E.2d 690, 238 Ed. Law Rep. 394 \(2008\).](#)

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[FN3] [Chotkowski v. Connecticut Personnel Appeal Bd., 176 Conn. 1, 404 A.2d 868 \(1978\); Reier v. State Dept. of Assessments and Taxation, 397 Md. 2, 915 A.2d 970 \(2007\); Schall v. State ex rel. Dept. of Human Resources, 94 Nev. 660, 587 P.2d 1311 \(1978\); State ex rel. Couch v. Trimble Local School Dist. Bd. of Edn., 120 Ohio St. 3d 75, 2008-Ohio-4910, 896 N.E.2d 690, 238 Ed. Law Rep. 394 \(2008\); Pratt v. Board of Ed. of Uintah County School Dist., 592 P.2d 628 \(Utah 1979\).](#)

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[FN4] [Bishop v. Tice, 622 F.2d 349 \(8th Cir. 1980\); Chotkowski v. Connecticut Personnel Appeal Bd., 176 Conn. 1, 404 A.2d 868 \(1978\).](#)

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[FN5] [Schall v. State ex rel. Dept. of Human Resources, 94 Nev. 660, 587 P.2d 1311 \(1978\).](#)

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[FN6] [State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn., 93 Ohio St. 3d 558, 2001-Ohio-1608, 757 N.E.2d 339, 158 Ed. Law Rep. 435 \(2001\).](#)

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[FN7] [Monroe County, Florida v. U.S. Dept. of Labor, 690 F.2d 1359 \(11th Cir. 1982\).](#)

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[FN8] [Fiegenberg v. Com., Dept. of Labor and Industry, 33 Pa. Commw. 570, 382 A.2d 498 \(1978\).](#)

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[\[FN9\] Director of Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission, 373 Mass. 401, 367 N.E.2d 1168 \(1977\).](#)

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[\[FN10\] § 474.](#)

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[\[FN11\] Taylor v. U. S., 219 Ct. Cl. 86, 591 F.2d 688 \(1979\).](#)

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[\[FN12\] Rhode Island Public Telecommunications Authority v. Russell, 914 A.2d 984 \(R.I. 2007\).](#)

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[\[FN13\] Frommhagen v. U. S., 216 Ct. Cl. 1, 573 F.2d 52 \(1978\).](#)

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[\[FN14\] Whelan v. Pitts, 150 A.D.2d 380, 540 N.Y.S.2d 536 \(2d Dep't 1989\).](#)

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[\[FN15\] Skrypek v. Bennett, 7 N.Y.3d 919, 829 N.Y.S.2d 448, 861 N.E.2d 812 \(2006\).](#)

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## § 476. Name-clearing hearing

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [72.16](#)

Government allegations of professional incompetence made in connection with a public employee's termination may, if they significantly restrict future employment opportunities, sufficiently impair the employee's liberty interest that a name-clearing hearing should be afforded, but such a hearing is required only where the allegations go to the very heart of the employee's professional competence and threaten to damage his or her professional reputation, significantly foreclosing other employment opportunities.<sup>[FN1]</sup> To trigger this obligation, the employer must have created false information concerning the employee<sup>[FN2]</sup> and disseminated that information.<sup>[FN3]</sup> Where charges disseminated to the public do not implicate a discharged employee's good name, reputation, honor, or integrity, the employee is not entitled to a name-clearing hearing.<sup>[FN4]</sup> Furthermore, vague published statements about a public employee's incompetence, which do not specify which aspects of the job the employee was "incompetent" to perform, do not damage a public employee's professional reputation in a manner that requires a hearing.<sup>[FN5]</sup>

The sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false, and the appropriate remedy is only expungement of that material, not reinstatement.<sup>[FN6]</sup>

**Caution:** The failure to request a name-clearing hearing defeats a claim of deprivation of a liberty interest.<sup>[FN7]</sup>

**Observation:** The opportunity in a criminal trial<sup>[FN8]</sup> or for an arbitration hearing<sup>[FN9]</sup> may provide the "name-clearing" required to avoid a due process violation.

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<sup>[FN1]</sup> [O'Neill v. City of Auburn, 23 F.3d 685 \(2d Cir. 1994\)](#); [Bledsoe v. City of Horn Lake, Miss., 449 F.3d 650 \(5th Cir. 2006\)](#) (further stating that damage to reputation or the stigma of being discharged is not sufficient).

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<sup>[FN2]</sup> [Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 \(1977\)](#); [Ruggieri v. City of Somerville, 10 Mass. App. Ct. 43, 405 N.E.2d 982 \(1980\)](#).

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<sup>[FN3]</sup> [Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 \(1976\)](#); [Ruggieri v. City of Somerville, 10 Mass. App. Ct. 43, 405 N.E.2d 982 \(1980\)](#).

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<sup>[FN4]</sup> [Lutwin v. Alleyne, 58 N.Y.2d 889, 460 N.Y.S.2d 498, 447 N.E.2d 46 \(1983\)](#).

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<sup>[FN5]</sup> [O'Neill v. City of Auburn, 23 F.3d 685 \(2d Cir. 1994\)](#).

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<sup>[FN6]</sup> [Swinton v. Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 \(1999\)](#).

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[\[FN7\] Bledsoe v. City of Horn Lake, Miss., 449 F.3d 650 \(5th Cir. 2006\).](#)

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[\[FN8\] Graham v. City of Philadelphia, 402 F.3d 139 \(3d Cir. 2005\).](#)

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[\[FN9\] Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities, 64 F.3d 810 \(2d Cir. 1995\).](#)

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**§ 477. Name-clearing hearing—At-will and probationary employees**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [72.16\(2\)](#)

Although an at-will public employee does not have a property right to continued employment cognizable under the due process clause of the Fifth Amendment,[\[FN1\]](#) such an employee does, however, have a cause of action for infringement of liberty, if the circumstances of the dismissal come within the criteria[\[FN2\]](#) requiring a name-clearing hearing,[\[FN3\]](#) and is entitled to a hearing for the sole purpose of clearing one's name and restoring one's

reputation.[\[FN4\]](#) The same rule applies to probationary employees.[\[FN5\]](#) However, a terminated public probationary officer is not entitled to a name-clearing hearing where the termination reasons were neither stigmatizing, nor publicly disseminated.[\[FN6\]](#)

Even when the necessary elements of a due process liberty interest in reputation are present, public agencies are not required to hold name-clearing hearings for discharged at-will or probationary employees except on demand and can avoid the hearing by removing the stigmatizing material from the employee's personnel file.[\[FN7\]](#)

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[\[FN1\] § 448.](#)

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[\[FN2\] § 476.](#)

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[\[FN3\] Wilderman v. Nelson, 467 F.2d 1173 \(8th Cir. 1972\); Mervin v. F.T.C., 591 F.2d 821 \(D.C. Cir. 1978\); Ruggieri v. City of Somerville, 10 Mass. App. Ct. 43, 405 N.E.2d 982 \(1980\).](#)

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[\[FN4\] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 \(1972\); Robison v. Wichita Falls & North Texas Community Action Corp., 507 F.2d 245 \(5th Cir. 1975\); Borschel v. City of Perry, 512 N.W.2d 565 \(Iowa 1994\); Ruggieri v. City of Somerville, 10 Mass. App. Ct. 43, 405 N.E.2d 982 \(1980\).](#)

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[\[FN5\] Phillips v. Civil Service Com., 192 Cal. App. 3d 996, 237 Cal. Rptr. 751 \(4th Dist. 1987\).](#)

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[\[FN6\] O'Neal v. Schembri, 212 A.D.2d 369, 622 N.Y.S.2d 32 \(1st Dep't 1995\).](#)

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[\[FN7\] Swinton v. Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89 \(1999\).](#)

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**§ 478. Constitutional claims**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#)

For a public employee to establish that an employer conditioned his or her job in a way that impermissibly burdened a constitutional right, the employee must first demonstrate that the asserted right is protected by the Constitution and that he or she suffered "adverse employment action" for exercising the right, and then the employee is entitled to prevail if the adverse employment action was taken in such a way as to infringe the constitutionally protected right.<sup>[FN1]</sup> A petitioner's inability to satisfy this burden of demonstrating that the discharge was constitutionally impermissible defeats any claim of a right to a hearing.<sup>[FN2]</sup>

A public employee's transfer because of her marriage to a co-employee did not violate the employee's constitutional "intimate association" right to be married.<sup>[FN3]</sup>

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<sup>[FN1]</sup> [Akins v. Fulton County, Ga., 420 F.3d 1293 \(11th Cir. 2005\)](#).

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<sup>[FN2]</sup> [Zaretsky v. New York City Health and Hospitals Corp., 84 N.Y.2d 140, 615 N.Y.S.2d 341, 638 N.E.2d 986 \(1994\)](#).

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<sup>[FN3]</sup> [McCabe v. Sharrett, 12 F.3d 1558 \(11th Cir. 1994\)](#) (rejected on other grounds by, [Montgomery v. Carr, 101 F.3d 1117, 114 Ed. Law Rep. 750, 1996 FED App. 0371P \(6th Cir. 1996\)](#)).

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**§ 479. Constitutional claims—Denial of due process rights**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#)

63C Am. Jur. 2d Public Officers and Employees § 480

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## § 480. Constitutional claims—Violation of free speech rights

### West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) [1947](#)

### Trial Strategy

[Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech, 22 Am. Jur. Proof of Facts 3d 203](#)

A public employee is entitled to reinstatement for a discharge that infringes on the employee's constitutionally protected interest in freedom of speech.[FN1] To establish such a violation, the employee must show that the speech was constitutionally protected, and there was causal relationship between the speech and the adverse employment action,[FN2] in the sense that the protected activity was a substantial or motivating factor in the employer's decision.[FN3] If the public employee makes this showing, the defendant governmental entity has an opportunity to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.[FN4] However, it has also been said that the burden to justify the discharge varies depending on the nature of the employee's expression.[FN5] After the employer has met this burden, a court must balance between the interests of the employee, as a citizen, in commenting on matters of public concern, and the interests of the public employer in promoting the efficiency of the public services it performs through its employee,[FN6] but if the employer does not show that the termination was based on legitimate reasons grounded in the efficient conduct of public business, there is no need to balance interests, and the employee's interest in free speech prevails.[FN7]

**Observation:** To the extent that tort doctrines provide a civil damage remedy to a public employee terminated for political activity or affiliation in violation of a state constitutional provision on freedom of speech, that remedy may be limited by a tort claims act, and an individual official defendant is entitled to immunity and indemnity to the extent provided in that act.[FN8] On the other hand, claims of similar federal constitutional violations are not subject to the state's claims of sovereign immunity.[FN9]

### CUMULATIVE SUPPLEMENT

#### Cases:

In order to allege prima facie case of First Amendment retaliation, public employee must adequately aver that his speech was constitutionally protected, that he suffered an adverse action, and that a causal connection existed between his speech and the adverse action. [U.S.C.A. Const.Amend. 1. Pavone v. Puglisi, 353 Fed. Appx. 622 \(2d Cir. 2009\), petition for cert. filed, 78 U.S.L.W. 3523 \(U.S. Feb. 17, 2010\).](#)

[END OF SUPPLEMENT]

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[\[FN1\] McCullough v. University of Arkansas for Medical Sciences, 559 F.3d 855, 242 Ed. Law Rep. 634 \(8th Cir. 2009\).](#)

- As to dismissal from public employment based on the employee's speech, generally, see [§§ 197 et seq.](#)

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[\[FN2\] Hoyt v. Andreucci, 433 F.3d 320 \(2d Cir. 2006\).](#)

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[\[FN3\] James v. Texas Collin County, 535 F.3d 365 \(5th Cir. 2008\); McCullough v. University of Arkansas for Medical Sciences, 559 F.3d 855, 242 Ed. Law Rep. 634 \(8th Cir. 2009\).](#)

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[\[FN4\] Miller v. Clinton County, 544 F.3d 542 \(3d Cir. 2008\).](#)

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[\[FN5\] Watters v. City of Philadelphia, 55 F.3d 886 \(3d Cir. 1995\).](#)

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[\[FN6\] Miller v. Clinton County, 544 F.3d 542 \(3d Cir. 2008\).](#)

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[\[FN7\] Dixon v. Kirkpatrick, 553 F.3d 1294 \(10th Cir. 2009\).](#)

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[\[FN8\] Cantrell v. Morris, 849 N.E.2d 488 \(Ind. 2006\).](#)

- As to immunity from tort claims and actions under a tort claims act, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.](#)

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[\[FN9\] Alaska v. EEOC, 564 F.3d 1062 \(9th Cir. 2009\).](#)

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**§ 481. Constitutional claims—Actions based on political patronage considerations**

**West's Key Number Digest**

West's Key Number Digest, [Constitutional Law](#) [1475\(8\)](#), [1475\(9\)](#)

**Trial Strategy**

[Constitutional Employment Litigation: Political Discharge Case, 43 Am. Jur. Trials 1](#)

A three-part analysis applies to a case brought by public employees alleging that an adverse employment action was taken on the basis of political patronage considerations in violation of their First Amendment rights:

(1) Assuming that the plaintiffs' allegations are true, whether the employer's conduct was an impermissible infringement of First Amendment rights;

(2) Whether the plaintiffs have met their burden of proving that political discrimination was a substantial or motivating factor in the employer's employment decisions; and

(3) Whether the employer has rebutted this showing with sufficient evidence that the same employment decisions would have been reached regardless of the plaintiffs' constitutionally protected conduct. [\[FN1\]](#)

However, there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. [\[FN2\]](#)

Although a plaintiff has the ultimate burden of proof to demonstrate that First Amendment rights have been infringed because of political affiliation, the defending government entity has the burden of proof to demonstrate that an encroachment on an employee's First Amendment rights falls within the exception for employment where the party affiliation of the officeholder is an appropriate qualification. [\[FN3\]](#) The essential question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved. [\[FN4\]](#) An official job description is a presumptively reliable basis for determining functions for this purpose, [\[FN5\]](#) and the content of an employee handbook may be relevant to that inquiry. [\[FN6\]](#) A state legislature's decision whether a particular public job should be classified as political is entitled to some deference. [\[FN7\]](#)

Even if a public employee establishes by a preponderance of the evidence that political affiliation played a substantial or motivating factor in the adverse employment action, the employer may prove by a preponderance of the evidence the affirmative defense that the employee would have been dismissed regardless of political affiliation. [\[FN8\]](#)



A court must determine whether the plaintiff produced sufficient evidence for a jury to find that he or she was discharged because of political beliefs or affiliations.<sup>[FN9]</sup> If so, the question whether public employees were laid off because of their political affiliation is for the jury.<sup>[FN10]</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Once public employee has established prima facie case of First Amendment political discrimination, burden then shifts to defendant, who must articulate a nondiscriminatory basis for the adverse employment action and establish by a preponderance of the evidence that he would have taken the same employment action regardless of the employee's political affiliation. U.S.C.A. Const.Amend. 1. Del Toro-Pacheco v. Pereira-Castillo, 662 F. Supp. 2d 202 (D.P.R. 2009).

### [END OF SUPPLEMENT]

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<sup>[FN1]</sup> Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981); Nekolny v. Painter, 653 F.2d 1164, 8 Fed. R. Evid. Serv. 1592 (7th Cir. 1981); Barnard v. Jackson County, Mo., 43 F.3d 1218 (8th Cir. 1995); Branchick v. Com., Dept. of Labor and Industry, 496 Pa. 280, 436 A.2d 1182 (1981).

- As to the discharge of public officers or employees based on their political beliefs, affiliation, or activities, generally, see § 188.

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<sup>[FN2]</sup> Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

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<sup>[FN3]</sup> Peters v. Delaware River Port Authority of Pennsylvania and New Jersey, 16 F.3d 1346 (3d Cir. 1994).

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<sup>[FN4]</sup> Nader v. Blair, 549 F.3d 953 (4th Cir. 2008).

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<sup>[FN5]</sup> Lopez-Quiñones v. Puerto Rico Nat. Guard, 526 F.3d 23 (1st Cir. 2008).

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<sup>[FN6]</sup> Lane v. City of LaFollette, Tenn., 490 F.3d 410 (6th Cir. 2007).

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<sup>[FN7]</sup> Lane v. City of LaFollette, Tenn., 490 F.3d 410 (6th Cir. 2007).

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<sup>[FN8]</sup> Peguero-Moronta v. Santiago, 464 F.3d 29 (1st Cir. 2006).

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<sup>[FN9]</sup> Lane v. City of LaFollette, Tenn., 490 F.3d 410 (6th Cir. 2007).

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[\[FN10\] Acevedo-Garcia v. Monroig, 351 F.3d 547 \(1st Cir. 2003\).](#)

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## **§ 482. Other types of claims**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [66](#)

Under a state workers' compensation act that prohibits the discharge of a worker who has filed a claim or instituted, in good faith, any proceeding under the act,[\[FN1\]](#) a public employee's petition stating that the plaintiff was wrongfully terminated in violation of specified sections of the act alleges facts on which relief may be available, even though the record is silent concerning whether the employee had filed a compensation claim before being discharged.[\[FN2\]](#)

A discharged employee may not make a claim that his or her termination was not "necessary or advisable in the interests of the United States" under a federal statute,[\[FN3\]](#) where that assessment is for the Central Intelligence Director alone.[\[FN4\]](#)

An employee of a governmental agency, who is initially illegally terminated at meetings held in violation of a state open meetings act, but who is later properly terminated in compliance with that act, is entitled to injunctive relief

allowing reinstatement, back pay, and benefits for the period between the illegal and legal terminations; the relief sought is not barred by the doctrine of sovereign immunity.[FN5]

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[FN1] [Am. Jur. 2d, Wrongful Discharge §§ 93 et seq.](#)

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[FN2] [Gunn v. Consolidated Rural Water & Sewer Dist. No. 1, Jefferson County, Okl., 1992 OK 131, 839 P.2d 1345 \(Okla. 1992\).](#)

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[FN3] Former [50 U.S.C.A. § 403](#)(c), now contained in [50 U.S.C.A. § 403-4a](#)(e), which is discussed, generally, in [§ 186](#).

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[FN4] [Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 \(1988\).](#)

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[FN5] [Ferris v. Texas Bd. of Chiropractic Examiners, 808 S.W.2d 514 \(Tex. App. Austin 1991\)](#), writ denied, (Oct. 23, 1991).

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West's Key Number Digest, [Officers and Public Employees](#) [127](#), [131](#), [134](#) to [143](#)

### A.L.R. Library

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### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 71 to 92](#)

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## § 483. Actions by or on behalf of public body

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [134.1](#), [135](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees § 92](#) (Order—Granting permission to sue on official bond)

A government body may sue on an official's bond, where the official's act constitutes a breach of the bond.<sup>[FN1]</sup>

A judgment against the principal on an official bond is conclusive against the sureties, in the absence of fraud or collusion, although they did not have notice of the suit, where, by the express terms of their agreement or by reasonable implication from the very nature and intent of their obligation, they have stipulated to pay the damages and costs that may be recovered against the principal or otherwise to abide the decree or judgment of a court against the principal.<sup>[FN2]</sup>

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<sup>[FN1]</sup> [State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 \(1977\)](#); [State, for Use of Obion County v. Cobb, 184 Tenn. 675, 202 S.W.2d 819 \(1947\)](#).

- As to liability on official bonds, generally, see [§§ 344 et seq.](#)

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<sup>[FN2]</sup> [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 \(1963\)](#).

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**§ 484. Actions by or on behalf of injured private party**

**West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [135](#)

Under some statutes, an action will lie on the bond of a public officer to the use of any party aggrieved in the name of the people.<sup>[FN1]</sup> Furthermore, statutes sometimes provide that persons injured by the neglect of an officer may institute an action on the bond against the officer and sureties; these statutes treat the official bond as a contract that binds together the officer, the surety, and any citizen injured by the officer.<sup>[FN2]</sup> There is no requirement that sureties on official bonds must be sued in contract, and an action in tort against both the officer and the surety may be proper; on the other hand, one with standing may sue in contract on an official bond to receive compensatory damages, even when the breach of contract resulted in the death of another, which would give rise to an action for wrongful death.<sup>[FN3]</sup> Under a similar statute that allows a plaintiff to maintain a suit against a public officer and the surety on the official bond for acts of negligence in performing official duties, the public official's immunity is immaterial with respect to a claim on the bond.<sup>[FN4]</sup>

Even in the absence of express statutory authority, a private action may be maintained on an official bond where the legislative intent demonstrates that the bond protects private suitors as well as the named obligee.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Spaniol Ford, Inc. v. Froggatt, 478 P.2d 598 \(Wyo. 1970\).](#)

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<sup>[FN2]</sup> [Dixon v. American Liberty Ins. Co., 332 So. 2d 719 \(Ala. 1976\).](#)

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<sup>[FN3]</sup> [Dixon v. American Liberty Ins. Co., 332 So. 2d 719 \(Ala. 1976\).](#)

- As to parties plaintiff in such suits, see [§ 493](#).

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[\[FN4\] Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 195 Ed. Law Rep. 664 \(2005\).](#)

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[\[FN5\] City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1, 13 A.L.R.2d 887 \(1949\).](#)

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## § 485. Venue

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [138](#)

The question where venue lies in actions on official bonds is generally governed by statute.[\[FN1\]](#) Since an action on an official bond is transitory in character, an action on the bond of a finance commissioner in charge of a closed bank may be brought in a county other than that in which the bank is located.[\[FN2\]](#)

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[\[FN1\] Com. ex rel. Duvall v. Hall, 194 Va. 914, 76 S.E.2d 208 \(1953\).](#)

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[\[FN2\] State ex rel. Songer v. Fidelity & Deposit Co. of Maryland, 53 S.W.2d 1036, 85 A.L.R. 955 \(Mo. 1932\).](#)

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## **§ 486. Conditions precedent to bringing suit**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [136](#)

Generally, a demand is not necessary before bringing suit on an official bond,[\[FN1\]](#) and even under a statute that requires that a demand be made, making a demand on the principal is sufficient, there being nothing in the language of the provisions requiring a demand on the sureties for payment of any funds due from the official.[\[FN2\]](#)

Under some statutes, a written demand for payment of money allegedly due to the public body must be served by a state official on the officer or surety, and the officer or surety must be given a specified time to pay before an action may be brought, but substantial compliance is sufficient.[\[FN3\]](#)



An action on a bond conditioned on the officer's faithful discharge of the duties of the office may be maintained without a prior adjudication of the damages claimed.[[FN4](#)]

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[[FN1](#)] [Fidelity & Deposit Co. of Maryland v. Port of Seattle, 106 F.2d 777 \(C.C.A. 9th Cir. 1939\).](#)

- As to presumptions of demand, generally, see [§ 487](#).

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[[FN2](#)] [Smith v. State ex rel. Thomas, 194 Tenn. 155, 250 S.W.2d 55 \(1952\).](#)

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[[FN3](#)] [State ex rel. Patterson for Use and Benefit of Adams County v. Warren, 254 Miss. 293, 180 So. 2d 293 \(1965\),](#) suggestion of error sustained in part, overruled in part on other grounds, [254 Miss. 293, 182 So. 2d 234 \(1966\).](#)

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[[FN4](#)] [Small v. National Sur. Corp., 199 S.C. 392, 19 S.E.2d 658 \(1942\).](#)

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## § 487. Pleadings and proof; presumptions

### West's Key Number Digest

West's Key Number Digest, [Officers and Public Employees](#) [141](#), [142](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 71 to 85](#) (Complaints against public officer and sureties)

[Am. Jur. Pleading and Practice Forms, Public Officers and Employees §§ 86 to 91](#) (Defenses by sureties)

The petition or complaint in an action on an official bond must allege a breach of a condition of the bond.<sup>[FN1]</sup> Where a general charge of breaches of a bond in the nature of a conclusion is followed by allegations of specific instances in which the bond was breached, the sufficiency of the pleading will be determined by the sufficiency of the allegations of the specific instances.<sup>[FN2]</sup>

The view has been followed that if, during or at the end of the second or other successive term of a public officer, it is shown that there is a shortage in the officer's accounts, but there is no evidence concerning when the shortage occurred, it will generally be presumed that the shortage occurred during the term in which it was discovered; the burden is therefore on the sureties to prove to the contrary.<sup>[FN3]</sup> According to other authority, there is no presumption, from the mere fact of a defalcation, concerning the time when it occurred, and the burden of proving when it occurred rests on the plaintiff.<sup>[FN4]</sup>

Where a statute requires a demand on the principal before suit may be brought on the bond,<sup>[FN5]</sup> in the absence of a contrary showing, the presumption is that the demand was made.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Ratliff v. Stanley](#), 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); [City of Milwaukee v. Drew](#), 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 (1936).

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<sup>[FN2]</sup> [State ex rel. Songer v. Fidelity & Deposit Co. of Maryland](#), 53 S.W.2d 1036, 85 A.L.R. 955 (Mo. 1932).

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<sup>[FN3]</sup> [Thurston County, to Use of Vesely v. Chmelka](#), 138 Neb. 696, 294 N.W. 857, 132 A.L.R. 1077 (1940).

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<sup>[FN4]</sup> [Independent School Dist. 93, Pottawatomie County, Okl. v. Western Sur. Co.](#), 419 F.2d 78 (10th Cir. 1969).

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[\[FN5\] § 486.](#)

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[\[FN6\] Smith v. State ex rel. Thomas, 194 Tenn. 155, 250 S.W.2d 55 \(1952\).](#)

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## **§ 488. Generally**

### **West's Key Number Digest**

West's Key Number Digest, [Officers and Public Employees](#) [139](#)

### **A.L.R. Library**

[What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176](#)

A statute of limitation specifically mentioning and covering official bonds or the sureties usually controls, regardless of any theory whether the bond constitutes a primary contractual obligation, or a mere collateral security for faithful

performance of the officer's duty.[\[FN1\]](#) A special limitation statute, expressly covering particular officers or their bonds and sureties, or expressly covering particular actions against public officers and their official bonds, also controls.[\[FN2\]](#) However, it has been held that a personal injury action brought against a public officer and surety is governed by the statute of limitations governing personal injury suits and not by specific statutes governing actions against public officers and sureties for malfeasance in office.[\[FN3\]](#)

While the applicable statute of limitations sometimes depends on whether the official bond is viewed as a primary contractual obligation,[\[FN4\]](#) or as mere collateral security,[\[FN5\]](#) some courts have followed both positions, with the result depending on the wording of the official bond involved.[\[FN6\]](#)

In some jurisdictions, the right of action on official bonds held by certain governmental entities is not barred by any statute of limitations.[\[FN7\]](#)

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[\[FN1\]](#) First Nat. Bank v. Moon, 243 Mich. 124, 219 N.W. 625 (1928); Neisius v. Henry, 143 Neb. 273, 9 N.W.2d 163 (1943); Thacker v. Fidelity & Deposit Co. of Maryland, 216 N.C. 135, 4 S.E.2d 324 (1939).

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[\[FN2\]](#) U.S. Fidelity & Guaranty Co. v. Toombs County, 187 Ga. 544, 1 S.E.2d 411 (1939); Wingate v. Davis, 77 Mont. 572, 252 P. 307 (1926); City of Milwaukee v. Drew, 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 (1936).

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[\[FN3\]](#) State v. Head, 194 Tenn. 576, 253 S.W.2d 756 (1952).

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[\[FN4\]](#) § 489.

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[\[FN5\]](#) § 490.

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[\[FN6\]](#) Hatcher v. State, 125 Tex. 84, 81 S.W.2d 499, 98 A.L.R. 1213 (Comm'n App. 1935).

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[\[FN7\]](#) Massachusetts Bonding & Ins. Co. v. Board of Com'rs of Adams County, 100 Colo. 398, 68 P.2d 555 (1937); Hemphill County v. Adams, 408 S.W.2d 926 (Tex. 1966).

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**§ 489. Bond viewed as primary contractual obligation**

**West's Key Number Digest**

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**A.L.R. Library**

[What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176](#)

Courts that have taken the position that a public officer's official bond creates a primary contractual obligation[[FN1](#)] have sometimes followed the view that an action against a public officer and sureties for breach of an official duty is an action on the bond, which, in the absence of a more specific statute, is governed by statutes of limitations relating to actions on a written contract or sealed instrument,[[FN2](#)] or statutes of limitation specifically mentioning and covering official bonds or sureties on them.[[FN3](#)]

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[[FN1](#)] § 127.

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[[FN2](#)] [Washburn v. Foster](#), 87 Ga. App. 132, 73 S.E.2d 240 (1952); [Village of Herkimer v. American Sur. Co. of New York](#), 18 A.D.2d 94, 238 N.Y.S.2d 290 (4th Dep't 1963); [Maxwell v. Stack](#), 246 Wis. 487, 17 N.W.2d 603 (1945).

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[[FN3](#)] [National Surety Co. of New York v. Hester's Adm'r](#), 241 Ky. 623, 44 S.W.2d 563 (1931); [Com., for Use of Fayette County, v. Perry](#), 330 Pa. 355, 199 A. 204 (1938).

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## **§ 490. Bond viewed as collateral security**

### **West's Key Number Digest**

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### **A.L.R. Library**

[What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176](#)

Cases that have taken the position that a public officer's bond is merely collateral security for the performance of the officer's duties,[[FN1](#)] have followed the view that an action against a public officer for breach of an official duty and sureties is not governed by statutes of limitation relating to actions on a written contract, but come within the limitation period governing liability created by statute.[[FN2](#)] Other courts apply the limitation period governing official liability, or the specific tort arising from the alleged breach of official duty,[[FN3](#)] or the limitation relating to contracts, obligations, or liabilities not founded on instruments in writing.[[FN4](#)]

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[\[FN1\] § 127.](#)

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[\[FN2\] Griffith v. State, 41 Ariz. 536, 20 P.2d 295 \(1933\); Oakes v. American Surety Co. of New York, 58 Idaho 482, 76 P.2d 932 \(1938\); State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 \(1977\); Pierce County v. Newman, 26 Wash. 2d 63, 173 P.2d 127 \(1946\).](#)

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[\[FN3\] Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 \(1st Dist. 1945\); Box Elder County v. Harding, 83 Utah 386, 28 P.2d 601 \(1934\).](#)

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[\[FN4\] Pierce County v. Newman, 26 Wash. 2d 63, 173 P.2d 127 \(1946\).](#)

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**§ 491. When statute commences to run**

**West's Key Number Digest**

**A.L.R. Library**

[What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176](#)

In the case of a defalcation or conversion by a public officer, or in the case of a loss through the failure of the bank in which the officer has deposited public funds, the statute of limitations does not commence running against an action on an official bond until the close of the principal's term of office,[[FN1](#)] or until the time of the officer's failure to satisfy a demand for the funds, or such other time as the officer is, by law, required to account.[[FN2](#)] Thus, an action for the failure of the officer to pay the successor in office the full amount that should have been paid accrues at the end of the term, and it is of no consequence that the officer in question was his or her own successor in office.[[FN3](#)] A cause of action may also accrue when the officer fails to turn over money within the time provided by statute.[[FN4](#)]

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[[FN1](#)] [Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 \(1st Dist. 1945\); Pierce County v. Newman, 26 Wash. 2d 63, 173 P.2d 127 \(1946\).](#)

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[[FN2](#)] [American Sur. Co. of New York v. Independent School Dist. No. 18 of Lake Park, Minn., 53 F.2d 178, 81 A.L.R. 1 \(C.C.A. 8th Cir. 1931\)](#) (failure of bank); [Employers Liability Assur. Corp., Ltd. v. Lewis, 101 Ga. App. 802, 115 S.E.2d 387 \(1960\).](#)

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[[FN3](#)] [State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 \(1977\).](#)

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[[FN4](#)] [City of Leavenworth v. Hathorn, 144 Kan. 340, 58 P.2d 1160 \(1936\).](#)

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**§ 492. When statute commences to run—Actions involving fraud or concealment**

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[What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176](#)

Where an officer misappropriates money and fraudulently conceals that act, the applicable statute of limitations generally will not begin to run until the discovery of the fraud and of the breach of the condition of the bond.<sup>[FN1]</sup> However, there is also authority for the view that neither fraud nor concealment will toll the statute of limitations, because the failure to perform a duty imposed by statute is just as great without regard to whether it is actuated by fraud.<sup>[FN2]</sup>

While it has been held that to extend the statute of limitations, there must be actual as opposed to constructive fraud,<sup>[FN3]</sup> and that the fraud must consist of affirmative acts or representations that prevent discovery of the fraud, so that mere silence is not sufficient,<sup>[FN4]</sup> the view has also been followed that constructive or legal fraud on the part of the public officer is sufficient to extend the statute of limitations.<sup>[FN5]</sup>

Ordinarily, what constitutes reasonable diligence to discover fraud is a question of fact.<sup>[FN6]</sup>

In addition to these rules, a public officer bearing a fiduciary relationship to the public body and the surety may be subject to the rule that a fiduciary who fraudulently conceals a breach of his or her fiduciary obligation is estopped from invoking the statute of limitations as a defense in an action brought to enforce that fiduciary obligation.<sup>[FN7]</sup>

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<sup>[FN1]</sup> [U.S. Fidelity & Guaranty Co. v. Toombs County, 187 Ga. 544, 1 S.E.2d 411 \(1939\)](#); [Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 \(1st Dist. 1945\)](#); [Village of Herkimer v. American Sur. Co. of New York, 18 A.D.2d 94, 238 N.Y.S.2d 290 \(4th Dep't 1963\)](#); [Daves v. Lawyers Sur. Corp., 459 S.W.2d 655 \(Tex. Civ. App. Amarillo 1970\)](#), writ refused

n.r.e., (Feb. 24, 1971); [Town of Troy v. American Fidelity Co., 120 Vt. 410, 143 A.2d 469 \(1958\)](#).

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[FN2] [City of Leavenworth v. Hathorn, 144 Kan. 340, 58 P.2d 1160 \(1936\)](#).

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[FN3] [U.S. Fidelity & Guaranty Co. v. Toombs County, 187 Ga. 544, 1 S.E.2d 411 \(1939\)](#).

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[FN4] [Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 \(1st Dist. 1945\)](#).

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[FN5] [Daves v. Lawyers Sur. Corp., 459 S.W.2d 655 \(Tex. Civ. App. Amarillo 1970\)](#), writ refused n.r.e., (Feb. 24, 1971).

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[FN6] [Daves v. Lawyers Sur. Corp., 459 S.W.2d 655 \(Tex. Civ. App. Amarillo 1970\)](#), writ refused n.r.e., (Feb. 24, 1971) (the fact that misfiled papers were open to public inspection did not, as a matter of law, establish that the plaintiffs discovered the constructive fraud or, by reasonable diligence, could have discovered it so as to bar the action).

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[FN7] [Village of Herkimer v. American Sur. Co. of New York, 18 A.D.2d 94, 238 N.Y.S.2d 290 \(4th Dep't 1963\)](#).

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## § 493. Plaintiffs

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The persons who may properly be plaintiffs in an action on an official bond have been variously described as anyone interested,[[FN1](#)] any person aggrieved,[[FN2](#)] any person injured by the breach of the bond,[[FN3](#)] and all persons having a direct and proximate interest in the official act or omission and all persons connected with it, by estate or interest.[[FN4](#)] It has been held that a person may sue on the bond both in an individual capacity as a surviving spouse and in a capacity as the representative of the deceased's estate.[[FN5](#)]

In some jurisdictions, a private action on an official bond may, by statute, be brought in the name of the injured person.[[FN6](#)] In other states, the action must be brought in the name of the state or the obligee,[[FN7](#)] but the person who seeks redress is the real party in interest.[[FN8](#)]

**Caution:** A failure to object in a timely manner to the facial defect that the plaintiff did not sue in the name of the state waives the objection.[[FN9](#)]

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[[FN1](#)] [Jones v. Hadfield](#), 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488 (1936).

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[[FN2](#)] [Lynch v. Burgess](#), 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 (1929).

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[[FN3](#)] [Eckstein v. Massachusetts Bonding & Insurance Co.](#), 281 N.Y. 435, 24 N.E.2d 114, 125 A.L.R. 1143 (1939); [Price v. Price](#), 122 W. Va. 122, 7 S.E.2d 510, 128 A.L.R. 1088 (1940).

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[[FN4](#)] [Dixon v. American Liberty Ins. Co.](#), 332 So. 2d 719 (Ala. 1976).

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[[FN5](#)] [Dixon v. American Liberty Ins. Co.](#), 332 So. 2d 719 (Ala. 1976).

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[[FN6](#)] [Eckstein v. Massachusetts Bonding & Insurance Co.](#), 281 N.Y. 435, 24 N.E.2d 114, 125 A.L.R. 1143 (1939); [Price v. Price](#), 122 W. Va. 122, 7 S.E.2d 510, 128 A.L.R. 1088 (1940).

- As to whether actions may be brought on behalf of an injured private party, see [§ 484](#).

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[[FN7](#)] [State ex rel. Mather v. Carnes](#), 551 S.W.2d 272 (Mo. Ct. App. 1977) (overruled on other grounds by, [Hensel v. American Air Network, Inc.](#), 189 S.W.3d 582 (Mo. 2006)); [Brower v. Watson](#), 146 Tenn. 626, 244 S.W. 362, 26 A.L.R. 991 (1922); [City of Mullens v. Davidson](#), 133 W. Va. 557, 57 S.E.2d 1, 13 A.L.R.2d 887 (1949); [Lynch v. Burgess](#), 40 Wyo. 30,

[273 P. 691, 62 A.L.R. 849 \(1929\).](#)

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[FN8] [State ex rel. Mather v. Carnes, 551 S.W.2d 272 \(Mo. Ct. App. 1977\)](#) (overruled on other grounds by, [Hensel v. American Air Network, Inc., 189 S.W.3d 582 \(Mo. 2006\)](#)); [Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849 \(1929\).](#)

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[FN9] [State ex rel. Mather v. Carnes, 551 S.W.2d 272 \(Mo. Ct. App. 1977\)](#) (overruled on other grounds by, [Hensel v. American Air Network, Inc., 189 S.W.3d 582 \(Mo. 2006\)](#)).

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## § 494. Joinder

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Where the breaches of an official bond are distinct causes of action in favor of distinct persons, and there is not privity between them, they may not be joined as plaintiff.[FN1] In the case of a joint and several official bond, the officer

is not a necessary party in an action against the surety.[\[FN2\]](#) On the other hand, different sets of sureties on several bonds of an officer having substantially the same conditions and relating to the same matter may be joined in a single action, where all are liable for the breach for which recovery is sought.[\[FN3\]](#)

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[\[FN1\] Price v. Price, 122 W. Va. 122, 7 S.E.2d 510, 128 A.L.R. 1088 \(1940\).](#)

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[\[FN2\] State ex rel. Continental Cas. Co. v. Superior Court for Spokane County, 33 Wash. 2d 839, 207 P.2d 707 \(1949\).](#)

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[\[FN3\] City of Milwaukee v. Drew, 220 Wis. 511, 265 N.W. 683, 104 A.L.R. 1387 \(1936\).](#)

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### [Public officer's bond as subject to forfeiture for malfeasance in office, 4 A.L.R.2d 1348](#)

Recovery against a public officer on an official bond is limited to actual damages caused by the wrongful act itself.<sup>[FN1]</sup> Since official bonds are in the nature of indemnity bonds rather than penal or forfeiture bonds,<sup>[FN2]</sup> a public officer's statutory bond conditioned upon the faithful discharge of duties may not be forfeited in its entirety without reference to any definite pleaded or proven amount of loss.<sup>[FN3]</sup> In this regard it has been said that the words "penalty" or "penal sum," when used in connection with official bonds, connote merely security for damage actually caused by the breach of the condition, with recovery limited to an amount necessary to compensate for losses sustained, unless liquidated damages are clearly intended by the agreement.<sup>[FN4]</sup>

The surety may be liable for the cost of a special audit of the records of the office in question and reconstruction of the records themselves, where the maintenance of those records is among the public officer's duties.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 \(1963\).](#)

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<sup>[FN2]</sup> [§ 128.](#)

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<sup>[FN3]</sup> [State ex rel. Switzer v. Overturff, 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343 \(1948\).](#)

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<sup>[FN4]</sup> [Pennsylvania Turnpike Commission v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 \(1963\).](#)

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<sup>[FN5]</sup> [Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\).](#)

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**§ 496. Interest**

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[Time from which interest begins to run on fidelity or public officer's bond, 57 A.L.R.2d 1317](#)

A public body entitled to recover on an official bond is ordinarily entitled to recover interest.<sup>[FN1]</sup> If the principal<sup>[FN2]</sup> or surety<sup>[FN3]</sup> fails to discharge its liability when it matures, some courts hold that interest may be allowed on the amount from the time the liability arises, even if the amount of recovery exceeds the penalty. Other courts hold that sureties are liable only from their own default in withholding payment after being notified of the official's default, and thus interest accrues from the date of notice of the breach,<sup>[FN4]</sup> or demand for payment.<sup>[FN5]</sup> Other courts, based on the principle that the surety on an official bond is answerable for the same damages for which the public officer is liable, have followed the view that the surety is liable for interest on misappropriated money from the date of the wrong, up to the limits of coverage of the bond, but the surety is liable beyond the penal sum only for interest with respect to its own default, which arises only on a demand on the surety to pay.<sup>[FN6]</sup>

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<sup>[FN1]</sup> [Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); State v. Moody, 198 So. 2d 586 \(Miss. 1967\).](#)

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<sup>[FN2]</sup> [American Cas. Co. of Reading, Pa. v. Texas Real Estate Commission, 362 S.W.2d 192 \(Tex. Civ. App. El Paso 1962\), writ refused n.r.e., \(Mar. 13, 1963\).](#)

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[\[FN3\] Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); State v. Moody, 198 So. 2d 586 \(Miss. 1967\); Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\); Lee v. Martin, 188 N.C. 119, 123 S.E. 631 \(1924\); American Cas. Co. of Reading, Pa. v. Texas Real Estate Commission, 362 S.W.2d 192 \(Tex. Civ. App. El Paso 1962\)](#), writ refused n.r.e., (Mar. 13, 1963).

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[\[FN4\] State v. American Surety Co. of New York, 37 N.M. 411, 24 P.2d 267, 89 A.L.R. 1314 \(1933\); American Cas. Co. of Reading, Pa. v. Texas Real Estate Commission, 362 S.W.2d 192 \(Tex. Civ. App. El Paso 1962\)](#), writ refused n.r.e., (Mar. 13, 1963).

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[\[FN5\] Keen v. Lewis, 215 Ga. 166, 109 S.E.2d 764 \(1959\); State v. Moody, 198 So. 2d 586 \(Miss. 1967\); State v. American Surety Co. of New York, 37 N.M. 411, 24 P.2d 267, 89 A.L.R. 1314 \(1933\); American Cas. Co. of Reading, Pa. v. Texas Real Estate Commission, 362 S.W.2d 192 \(Tex. Civ. App. El Paso 1962\)](#), writ refused n.r.e., (Mar. 13, 1963).

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[\[FN6\] Commissioners of Leonardtown v. Fidelity & Cas. Co. of New York, 259 Md. 532, 270 A.2d 788 \(1970\); Borough of Totowa v. American Sur. Co. of New York, 39 N.J. 332, 188 A.2d 586 \(1963\).](#)

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## § 497. Attorney's fees

### West's Key Number Digest

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Statutory provisions making insurance companies liable for the attorney's fees of the other party when the insurer has refused without just cause or excuse to pay the full amount of the loss[[FN1](#)] may encompass an insurance company in its capacity as a surety on an official bond.[[FN2](#)] A surety is not liable for attorney's fees under such a statute when its refusal to pay the full amount of the loss is based on a reasonable dispute concerning when the cause of action against the public officer accrued.[[FN3](#)]

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[[FN1](#)] [Am. Jur. 2d, Insurance § 2064.](#)

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[[FN2](#)] [State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 \(1977\).](#)

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[[FN3](#)] [State ex rel. Grassie v. Masterson, 221 Kan. 540, 561 P.2d 796 \(1977\).](#)

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**§ 498. Subrogation or indemnification of surety**

**West's Key Number Digest**

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A surety that has paid the state its claim against the public officer is entitled to the benefit of the state's rights, including the state's exemption from the statute of limitations.<sup>[FN1]</sup> A surety on an official bond that has made good the loss is subrogated not only to the rights to which the creditor was entitled as against the principal, but also to the creditor's rights against third persons.<sup>[FN2]</sup> Under this rule, sureties may have recourse against a bank in which a public officer deposited public funds or against a third person to whom the officer has paid the money in settlement of a debt and who had knowledge of the nature of the funds used.<sup>[FN3]</sup>

Official bonds may contain agreements requiring that the public officer indemnify the surety,<sup>[FN4]</sup> sometimes expressly including for attorney's fees and other expenses of defending the action against the public officer.<sup>[FN5]</sup>

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<sup>[FN1]</sup> [American Bonding Co. v. National Mechanics' Bank](#), 97 Md. 598, 55 A. 395 (1903); [American Surety Co. of New York v. Multnomah County](#), 171 Or. 287, 138 P.2d 597, 148 A.L.R. 926 (1943).

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<sup>[FN2]</sup> [State ex rel. Mather v. Carnes](#), 551 S.W.2d 272 (Mo. Ct. App. 1977) (overruled on other grounds by, [Hensel v. American Air Network, Inc.](#), 189 S.W.3d 582 (Mo. 2006)).

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<sup>[FN3]</sup> [American Surety Co. of New York v. Multnomah County](#), 171 Or. 287, 138 P.2d 597, 148 A.L.R. 926 (1943).

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<sup>[FN4]</sup> [Jackson v. Hollowell](#), 685 F.2d 961 (5th Cir. 1982); [U.S. Fidelity & Guaranty Co. v. Love](#), 260 Ark. 374, 538 S.W.2d 558 (1976); [National Sur. Corp. v. Vandevender](#), 235 Miss. 277, 108 So. 2d 860 (1959).

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<sup>[FN5]</sup> [Jackson v. Hollowell](#), 685 F.2d 961 (5th Cir. 1982); [National Sur. Corp. v. Vandevender](#), 235 Miss. 277, 108 So. 2d 860 (1959).

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